(38)

No. 03-1500
Title: Thomas Van Orden, Petitioner
v.
Rick Perry, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al.
Docketed: May 5, 2004
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (02-51184)
Decision Date: November 12, 2003
Rehearing Denied: January 5, 2004
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 31 2004	Petition for a writ of certiorari filed. (Response due June 4, 2004)
May 28 2004	Order extending time to file response to petition to and including July 6, 2004.
Jul 6 2004	Brief amici curiae of Indiana, et al. filed.
Jul 6 2004	Brief of respondents Rick Perry, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al. filed.
Jul 21 2004	DISTRIBUTED for Conference of September 27, 2004.
Oct 4 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 12 2004	Petition GRANTED.
Oct 27 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 13, 2004.
Nov 17 2004	Letter from counsel for petitioner giving blanket consent to the filing of amicus curiae briefs.
Dec 8 2004	Brief amicus curiae of Indiana, et al. filed.
Dec 10 2004	Brief amicus curiae of Council for Secular Humanism filed.
Dec 10 2004	Brief amici curiae of Baptist Joint Committee and The Interfaith Alliance Foundation filed.
Dec 10 2004	Brief amicus curiae of American Atheists filed. (Distributed)
Dec 13 2004	Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
Dec 13 2004	Brief amicus curiae of Freedom From Religion Foundation filed.
Dec 13 2004	Brief amici curiae of American Jewish Congress, et al. filed.
Dec 13 2004	Brief amici curiae of Hindu American Foundation and Others Representing the Intersts of Hindus, Buddhists and Jains filed.
Dec 13 2004	Brief amici curiae of American Humanist Association, et al. filed. VIDED.
Dec 13 2004	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED.
Dec 13 2004	Joint appendix filed.
Dec 13 2004	Brief of petitioner Thomas Van Orden filed.
Dec 13 2004	Brief amicus curiae of Atheist Law Center, et al. filed.
Dec 15 2004	SET FOR ARGUMENT ON Tuesday, March 2, 2005.
Dec 15 2004	CIRCULATED.
Jan 4 2005	Extension of time within which to file respondents' brief on the merits to and including January 31, 2005.

Jan 12 2005	Record received from U.S.C.A. 5th Circuit. (1 box)
Jan 12 2005	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Jan 13 2005	Record received from U.S.D.C. Western Dist. of Texas. (1 box) and 1 VHS tape received from Attorney General of Texas on February 11, 2005
Jan 26 2005	Brief amicus curiae of Thomas More Law Center filed. (Distributed)
Jan 28 2005	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. (Distributed)
Jan 28 2005	Brief amicus curiae of United States filed. (Distributed)
Jan 28 2005	Brief amicus curiae of Chester County Historic Preservation Network filed. (Distributed)
Jan 31 2005	Brief amicus curiae of Becket Fund for Religious Liberty filed. (Distributed)
Jan 31 2005	Brief amicus curiae of Ethics and Public Policy Center filed. (Distributed)
Jan 31 2005	Brief of respondents Rick Perry, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al. filed. (Distributed)
Jan 31 2005	Brief amicus curiae of National Jewish Commision on Law and Public Affairs filed. (Distributed)
Jan 31 2005	Brief amici curiae of Janet Napolitano, et al. filed. (Distributed)
Jan 31 2005	Brief amicus curiae of Pacific Justice Institute filed. (Distributed)
Jan 31 2005	Brief amici curiae of Focus on the Family and Family Reseach Council filed. (Distributed)
Jan 31 2005	Brief amicus curiae of Foundation for Moral Law, Inc. filed. (Distributed)
Jan 31 2005	Brief amicus curiae of American Family Association Center for Law & Policy filed. (Distributed)
Jan 31 2005	Brief amicus curiae of Fraternal Order of Eagles filed. (Distributed)
Jan 31 2005	Motion of Foundation for Moral Law, Inc. for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 31 2005	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. (Distributed)
Jan 31 2005	Brief amicus curiae of WallBuilders, Inc. filed. (Distributed)
Jan 31 2005	Brief amicus curiae of American Center for Law and Justice filed. (Distributed).
Jan 31 2005	Brief amici curiae of Faith and Action, et al. filed. (Distributed)
Feb 2 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 4 2005	Motion of Faith and Action, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Feb 18 2005	Motion of Foundation for Moral Law, Inc. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Feb 18 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 18 2005	Motion of Faith and Action, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Feb 22 2005	Reply of petitioner Thomas Van Orden filed. (Distributed)

(1)
Supreme Court, U.S.
FILED
MAR 31 2004
OFFICE OF THE CLERK

No. 03-1500

In The

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 351 F.3d 173 (5th Cir. 2003). A copy of this opinion is included as Appendix A. The United States Court of Appeals for the Fifth Circuit denied *en banc* review on January 5, 2004. A copy of this order is included as Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for redress of grievances." U.S. Const., amend. I.

STATEMENT OF THE CASE

On the grounds of the Texas State Capitol there is a large granite monument in which the Ten Commandments are etched. The monument is approximately six feet high and three and a half feet wide and is located on a line drawn between the Supreme Court and the Capitol Rotunda, approximately 75 feet from the Capitol building

and 123 feet from the Supreme Court building. Anyone walking from the Capitol to the Supreme Court would see this prominently displayed monument. The monument contains the Ten Commandments written in very large letters. Above the text, there are two small tablets with ancient script. The monument also includes two small Stars of David; two Greek letters, Chi and Rho, superimposed over each other to represent Christ; an American eagle grasping the American flag; and an eye inside a pyramid, which is similar to the symbol on the one-dollar bill. These other symbols are much smaller than the text of the Ten Commandments, which occupies most of the space on the monument. Under the Ten Commandments are the words, "Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas, 1961." A picture of the monument is included as Appendix C.

There are several other monuments on the grounds of the Texas State Capitol, but the Ten Commandments monument is the only one with religious content. In the area between the Capitol and the Supreme Court building there is a monument paying tribute to children in Texas; a statue of a pioneer woman holding a child; a replica of the Statute of Liberty; and a tribute to Texans who died at Pearl Harbor. 351 F.3d at 176.

The Ten Commandments monument, like the others, is maintained by the State Preservation Board. The monument was a gift of the Fraternal Order of Eagles and was accepted by a joint resolution of the House and the Senate in early 1961. *Tex. S. Con. Res. 16,* 57th Leg. R.S., 1961 Tex. Gen. Laws 1195-1196. The resolution also authorized the placement of the monument on the Capitol grounds.

The parties to this litigation stipulated that the State selected the site for the monument based on the recommendation of the Building Engineering and Management Division of the State Board of Control. The expenses of its construction were borne by the Eagles.

There is very little legislative history concerning the Texas legislature's approval of the Ten Commandment monument. The parties stipulated that the legislative history "contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate journal entries." The parties also stipulated that the dedication of the monument was presided over by Senator Bruce Reagan and Representative Will Smith.

The State Preservation Board, an agency of the State of Texas, was created by the Legislature in 1983. *V.T.C.A. Government Code,* §443.001. Ownership of the Capitol Building, including the Ten Commandments monument, was soon transferred to the Board. The Board is vested with and exercises broad authority over the Capitol Building and grounds, including maintaining the Ten Commandments monument. *V.T.C.A. Government Code,* §443.001.

In 1990, at the direction of the Board, the Ten Commandments monument was removed and placed in storage for construction of the Capitol extension. In 1993, although other monuments were not replaced after being taken down, the State Preservation Board decided to retain the Ten Commandments monument, keep it in its current location, but turn it to face in a different direction. 351 F.3d at 181.

The plaintiff, Thomas Van Orden, is a resident of Austin, Texas and brought this action to have the Ten Commandments monument removed from the grounds of the State Capitol. The District Court entered judgment for the defendants and the United States Court of Appeals for the Fifth Circuit affirmed. Van Orden's motion for rehearing and suggestion for rehearing *en banc* was denied.

REASON FOR GRANTING THE WRIT

THE SUPREME COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO DECIDE A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER A TEN COMMANDMENTS MONUMENT ON GOVERNMENT PROPERTY IS AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT

A. The Circuits Are Split Over The Issue Of Whether Ten Commandments Monuments On Government Property Violate The Establishment Clause

Seven Circuits now have ruled on the question of whether Ten Commandments displays on government property violate the Establishment Clause. Three Circuits, including the Fifth Circuit in this case, have rejected the constitutional challenges and allowed the monuments to remain. *See also Freethought Society of Greater Pa. v. Chester County,* 334 F.3d 247 (3d Cir. 2003); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973). Four Circuits, though, have come to an opposite conclusion and have found Ten Commandments monuments unconstitutional. *See ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004); *ACLU of Kentucky v. McCreary County,* 354 F.3d 438 (6th Cir. 2003); *Glassroth v. Moore,* 335 F.3d 1282 (11th Cir. 2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart, Indiana*, 235 F.2d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

Almost all of these decisions, like this case, involved Ten Commandments monuments on government property placed there by the Fraternal Order of Eagles. All involved monuments that had been on government property for some time, often decades, before the constitutional challenge. Most of the cases are very recent, reflecting a national trend to challenges of the sort brought in this case.

Indeed, shortly after the Fifth Circuit decided this case and found no violation of the Establishment Clause, the United States Court of Appeals for the Eighth Circuit came to an opposite conclusion in a case with virtually identical facts. *ACLU Nebraska Foundation v. City of Plattsmouth* involved a five foot tall granite monument containing the Ten Commandments placed in a park in the City of Plattsmouth. 358 F.3d at 1025. As in this case, the monument was a gift from the Fraternal Order of Eagles. The Plattsmouth monument has the identical content to the one found on the grounds of the Texas State Capitol: an inscription of the Ten Commandments in large letters, an eye within a triangle, two Stars of David, and the intertwined symbols for "chi" and "rho." The monument also had a statement that it was donated by the Fraternal Order of Eagles. *Id.*

As in this case, there is virtually no legislative history of the government's purpose in placing the monument on government property in Plattsmouth. But unlike this case, the United States Court of Appeals for the Eighth Circuit concluded that the Ten Commandments are inherently religious and thus have the purpose and effect of impermissibly advancing religion under the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Eighth Circuit explained that "the monument's religious purpose stands naked in the middle of the park with no evident purpose but to endorse and advance its religious message." 358 F.3d at 1037.

The conflict between the Fifth Circuit, in this case, and the Eighth Circuit, in *ACLU Nebraska Foundation v. City of Plattsmouth*, is indicative of the split which exists among Circuits throughout the country. For example, the Tenth Circuit, in *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973), found that the Establishment Clause was not violated by the presence on courthouse grounds of a granite monument, measuring three feet by five feet, with the same content as the monument in this case. As in this case, the monument was donated by the Fraternal Order of Eagles. In contrast, the Seventh Circuit found that an identical monument on the grounds of a county courthouse violated the Establishment Clause. *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

The Circuits are also split as to when the Establishment Clause is violated by Ten Commandments displays on government property that are depicted in forms other than monuments. For example, the United States Court of Appeals for the Third Circuit found that the presence on the wall of a county courthouse of a plaque containing the

Ten Commandments did not violate the Establishment Clause. *Freethought Society of Greater Pa. v. Chester County,* 334 F.3d 247 (3d Cir. 2003). But the United States Court of Appeals for the Sixth Circuit found that the posting of framed copies of the Ten Commandments in county courthouses and schools violated the Establishment Clause. *ACLU of Kentucky v. McCreary County,* 354 F.3d 438 (6th Cir. 2003).

There is no way to reconcile these cases. The Circuits are split as to whether and when displays presenting the Ten Commandments are allowed on government property. As the Eighth Circuit recently noted: "Even considering the different factual contexts of these monuments, it would appear that the decisions of the Fifth and Tenth Circuits and the Colorado Supreme Court are in conflict with those of the Seventh and Sixth Circuits." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1035.

This Court should grant certiorari to resolve this conflict among the Circuits that will continue to generate a large number of lawsuits all over the country. The Fraternal Order of Eagles gave "scores of other monuments . . . to towns and cities in the 1950s and 1960s." *Id.* at 1025; *see also Books v. City of Elkhart,* 235 F.3d at 306 (describing the Fraternal Order of Eagles national campaign in the 1950s and 1960s to donate Ten Commandments monuments throughout the country). Each of these is the basis for a likely First Amendment challenge and courts are divided over when and whether such displays are allowed.

B. This Court Should Grant Review To Clarify The Law Of The Establishment Clause Concerning When Religious Symbols On Government Property Violate The Establishment Clause

The six-foot by three-and-a-half-foot granite–monument, located between the Texas State Capitol and the Texas Supreme Court, contains the following words in large letters:

> the Ten Commandments
> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife nor his manservant nor his maidservant, nor his cattle nor anything that is his neighbor's.

See Appendix C (photograph of the monument).

The constitutionality of this large monument prominently displayed on government property raises important issues concerning the meaning of the Establishment Clause: How is it determined if a monument is a religious symbol? How is it determined whether the purpose of a symbol is to advance religion? How is it determined

whether a symbol has the effect of impermissibly advancing religion? As to these specific questions, as well as the general issue of the constitutionality of Ten Commandments displays on government property, the Circuits are split.

1. Is the Ten Commandments monument religious?

There is no doubt that the Ten Commandments are religious, both in their origin and in their content. As this Court expressed in *Stone v. Graham*, 449 U.S. 39, 41 (1980): "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." As Justice Stevens explained: "[The phrase] 'I AM the LORD thy GOD' . . . is rather hard to square with the proposition that the monument expresses no particular religious preference – particularly when considered in conjunction with . . . [the fact] that the monument also depicts two Stars of David and symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ." *Elkhart v. Books,* 532 U.S. 1058 (2001) (Stevens, J., opinion respecting denial of certiorari).

Yet, the Circuits are divided over how to characterize monuments containing the Ten Commandments. The Fifth Circuit, in this case, described the monument as displaying "a nonsectarian version of the text of the Commandments." *Van Order v. Perry*, 351 F.3d at 176. But the Eighth Circuit, for example, regards the Ten Commandments as inherently sectarian, expressing the views of particular religions. The Eighth Circuit explained that "[t]he reasonable viewer would perceive this monument as

an attempt by Plattsmouth to steer its citizens in the direction of mainstream Judeo-Christian religion." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1042. The court concluded: "The monument's endorsement of multiple Judeo-Christian faiths, instead of one particular sect, is no less of an establishment than endorsement of one alone." *Id.* Indeed, the Fifth Circuit's characterization of the Ten Commandments display as "nonsectarian" is inconsistent with this Court's declaration that "[t]he simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allgeheny v. American Civil Liberties Union*, 492 U.S. 573, 615 (1989).

Moreover, there is disagreement among the Circuits as to whether a Ten Commandments display can be understood as a historical, rather than a religious symbol. The Fifth Circuit in this case emphasized the historical importance of the Ten Commandments and stated: "Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. The extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars." *Van Orden v. Perry*, 351 F.3d at 181.

This is inconsistent with this Court's decision in *Stone v. Graham*, which rejected the argument that a display of the Ten Commandments was permissible as a recognition of the historical basis for our laws. As the Eighth Circuit recently declared in rejecting the view that a display of the Ten Commandments on government property is just historical acknowledgment of God: "The monument does much more than acknowledge God; it is an instruction

from the Judeo-Christian God on how He requires His followers to live. To say a monument inscribed with the Ten Commandments and various religious and patriotic symbols is nothing more than an acknowledgment of God diminishes the sanctity to believers and belies the words themselves." 358 F.3d at 1042.

The underlying issue of how to determine whether a symbol is religious transcends this case and is important in a large number of disputes under the First Amendment. This Court should grant certiorari to resolve the conflicts between the Circuits over whether the Ten Commandments is a religious symbol and to clarify this important legal question.

2. Does the Ten Commandments monument have a secular purpose?

This Court has been clear that a government action violates the Establishment Clause unless there is a valid secular purpose. *Lemon v. Kurtzman,* 403 U.S. at 612-13. Moreover, this Court has explained that "[w]hile the Court is normally deferential to a State's articulation of a purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

In this case, there is no legislative history concerning why the Texas legislature accepted the Ten Commandments monument and placed it in a prominent position on the grounds of the Texas Capitol. Nonetheless, the Court of Appeals uncritically accepted that "the purpose of the legislature was 'to recognize and commend a private organization for its efforts to reduce juvenile delinquency.'" 351 F.3d at 173. This was based entirely on the

Resolution granting the Eagles permission to erect the monument. *Id.*

But by accepting this explanation without further support, and by ignoring the State Preservation Board's independent decision to reinstall the monument on Capitol grounds in 1993, the Court of Appeals violated this Court's command that courts "distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. School Dist. v. Doe,* 530 U.S. 290, 308 (2000). The Court of Appeals came to its conclusion by concluding that the "Commandments have a secular dimension as well as a religious meaning." 351 F.3d at 173. However, as this Court recognized in *Stone v. Graham*, the Ten Commandments are inherently religious. There is no secular purpose in placing on government property a monument declaring: "I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make thyself any graven image. Thou shalt not take the Name of the Lord thy God in vain."

Indeed, the Sixth, Seventh and Eighth Circuits rejected exactly the argument accepted by the Fifth Circuit in this case: that the government had a valid secular purpose in accepting a monument from the Fraternity of Eagles because of that organization's commitment to combating juvenile delinquency. The Sixth Circuit, in an approach at odds with that taken by the Fifth Circuit in this case, stated: "A finding of religious purpose is militated by the blatantly religious content of the displays. . . . [T]he Ten Commandments are an active symbol of religion because they 'concern the religious duties of believers.'" *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,* 354 F.3d at 455, quoting, *Stone v. Graham,* 449 U.S. at 42. Similarly, the Seventh Circuit declared: "The Ten Commandments is still

an inherently religious text, and we conclude that the State has not articulated a valid secular justification for planning to erect the monument. . . . The Commandments are historical, secular 'core values' only to those who adhere to them." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d at 771. Likewise, the Eighth Circuit concluded that the government's purpose in "accepting, erecting and maintaining the monument is to be found in the content and context of the monument itself. . . . The monument's message is undeniably religious. . . . The monument declares the existence and supremacy of God. Some of the rules of behavior are exclusively religious." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1036. The Fifth Circuit's acceptance of a secular, historical purpose for a Ten Commandments monument cannot be reconciled with the Eighth Circuit's statement that such a display "is the paradigmatic violation of the Establishment Clause: government speech declaring religious truth." *Id.* at *13.

Moreover, the Circuits are split as to whether the presence of a Ten Commandments monument for a long period of time affects the analysis of whether there is an impermissible purpose of advancing religion. The Fifth Circuit, in this case, gave great weight to the fact that the display had been on the State Capitol ground for 42 years before a constitutional challenge was brought: "Had this monument been recently installed, the inference of religious purpose would have been stronger. That it has been in place for so long adds force to the contention that the legislature had a secular purpose." *ACLU Nebraska Foundation v. City of Plattsmouth*, 351 F.3d at 181-82. But, in contrast, the Eighth Circuit found the fact that a Ten Commandments monument was on government

property for 35 years before a constitutional challenge did not refute that its purpose was to advance religion. *Id.* at 1038.

Thus, this Court should grant review to resolve a split among the Circuits as to whether a Ten Commandments monument on government property serves a valid secular purpose and, more generally, how the government's purpose is to be determined when an unquestionably religious symbol is erected on government property.

3. Does the Ten Commandments monument have the effect of advancing and endorsing religion?

This Court also has been clear that a government action violates the Establishment Clause if its principal or primary effect is one that advances religion. *Lemon v. Kurtzman*, 403 U.S. at 612. Under this test, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly,* 465 U.S. 668, 694 (1984).

The Fifth Circuit found that the presence of the Ten Commandments monument on the State Capitol grounds did not impermissibly endorse religion. The Court explained: "The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court building and the Capitol Building housing the legislative and executive branches of government. We are not persuaded that a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude

that the State is endorsing the religious rather than the secular message of the decalogue." 351 F.3d at 182.

There are several problems with the Fifth Circuit's analysis which warrant this Court granting certiorari to clarify how it is to be determined whether a religious symbol on government property is an impermissible symbolic endorsement of religion. First, the Fifth Circuit's reference to 17 monuments in the general area is misleading because, as the Fifth Circuit explained in its statement of the facts of this case, there are only three other monuments in the area where the Ten Commandments are located, between the Capitol and the Supreme Court building. 351 F.3d at 176.* None of the others has any religious content. *Id.* As the Eighth Circuit noted in declaring a similar Ten Commandments monument unconstitutional, "The monument's religiosity stands in sharp contrast to, and therefore is amplified by, the recreational uses of the space. Nothing about the park secularizes the pronounced religiosity of the monument." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1041.

Second, the Fifth Circuit concluded that the presence of the Ten Commandments near the State Capitol and State Supreme Court building conveyed a secular

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* Many of the other symbols referred to by the Fifth Circuit are plaques and memorabilia inside the buildings, including "a Six Flags Over Texas display on the floor of the Capitol Rotunda" and a phrase, in Latin, above the bench of the Texas Supreme Court. 351 F.3d at 176. These symbols are likely irrelevant to how the reasonable observer would perceive an overtly religious monument on the grounds between the Capitol and Supreme Court building.

message. But as other Circuits have concluded, a monument proclaiming the existence of God and God's rules for behavior inherently has the effect of endorsing for religion. For example, Eleventh Circuit came to the opposite conclusion to the Fifth Circuit in finding that a large Ten Commandments monument in the Alabama State Judicial Building clearly had the effect of endorsing religion. *Glassroth v. Moore,* 335 F.3d at 1296-97. Similarly, the Sixth Circuit found that posting framed copies of the Ten Commandments in courthouses and schools was inherently government endorsement of religion. *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d at 469.

Moreover, the Eighth Circuit found that the other symbols on the monument – present on the monument in both that case and in this one – created an impermissible effect of endorsing religion. The Court explained: "The monument's inscription links government to its religious message to a degree its location may not. Specifically, the inclusion of the patriotic symbol of an eagle gripping a flag on the monument impermissibly links patriotism and the government to the religious teaching on the monument." *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d at 1041. The Fifth Circuit ignored this aspect of the monument and its endorsement for religion.

Here, too, there is a need for this Court to grant review to resolve a conflict among the Circuits as to when a Ten Commandments monument impermissibly endorses religion and, more generally, how courts are to determine whether the reasonable observer would find a symbolic

endorsement which violates the Establishment Clause of the First Amendment.

CONCLUSION

Thomas Van Orden respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

351 F.3d 173

United States Court of Appeals,
Fifth Circuit

Thomas **VAN ORDEN**, Plaintiff-Appellant,
v.
Rick **PERRY**, in his official capacity as Governor of Texas and Chairman, State Preservation Board; David Dewhurst, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; Tom Craddick, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; Chris Harris, in his official capacity as Member of the State Preservation Board; Peggy Hamrick, in her official capacity as Member of the State Preservation Board; Jocelyn Levi Straus, in her official capacity as Member of the Texas Preservation Board; Charlynn Doering, in her official capacity as Interim Executvie Director, State Preservatoin Board, Defendants-Appellees.

No. 02-51184.

Nov. 12, 2003.

Thomas Van Orden (argued), Austin, TX, pro se.

R. Ted Cruz (argued), Paul Michael Winget-Hernandez, Amy Warr, Austin, TX, for Defendants-Appellees.

Mathew D. Staver, Rena Marie-Anne Lindevaldsen, Joel Lee Oster, Erik William Stanley, Anita Leigh Staver,

Liberty Counsel, Longwood, FL, for Liberty Counsel, Amicus Curiae.

David S. Lill, Clark, Thomas & Winters, Austin, TX, Kelly J. Shackelford, Liberty Legal Institute, Plano, TX, for Liberty Legal Institute, Amicus Curiae.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, STEWART and PRADO, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The plaintiff, Thomas Van Orden, asks the federal courts to order the State of Texas to remove from the grounds of the State Capitol a granite monument in which the Ten Commandments are etched. In a bench trial, the district court considered documents, testimony, and an extensive stipulation of facts filed by the parties. In a careful opinion, the court rejected the claim of First Amendment violations and entered judgment for the State. The plaintiff appeals. We affirm.

I

The Capitol, with its surrounding twenty-two acres, was dedicated on May 16, 1888. The first monument was erected on these grounds three years later. It was "a bronze statue of a Texan holding a muzzle-loading rifle atop a Texas Sunset Red granite base." Names of the Texans who died in the battle of the Alamo are inscribed on its four granite supports. Sixteen additional monuments have since been erected on the capitol grounds, a

protected National Historic Landmark maintained by the State Preservation Board.[1]

The Visitor Services of the State provides tours of the Capitol Building with its historic statuary, portraits, and memorabilia, and it publishes a written guide for walking tours of the grounds for visitors who wish to continue with the outdoor displays. The guided tour of the Capitol Building offers a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas. They include a tribute to African American legislators, a Confederate plaque, a plaque commemorating the donors of the granite for the building, and a plaque commemorating the war with Mexico. There is a Six Flags Over Texas display on the floor of the Capitol Rotunda featuring the Mexican Eagle and serpent – which as visitors will learn, is a symbol of Aztec prophecy – together with the Confederate Seal containing the inscription "Deo Vindice" (God will judge). Should the tour continue to the Supreme Court Building, visitors will find inscribed above the bench the phrase "Sicut Patribus, Sit Deus Nobis" (As God was to our fathers, may He also be to us). Before reaching the Supreme Court building from the Capitol, visitors will encounter four other monuments in the immediate vicinity: a tribute to Texas children; a statue of a pioneer woman holding a child in tribute to the role of

[1] The parties stipulated that "the Capitol, together with its grounds and the monuments erected and maintained there, constitute a National Historic Landmark." They also stipulated that "the Ten Commandments monument is an element of a legally-protected National Historic Landmark."

women in Texas history; a replica of the Statue of Liberty; and a tribute to the Texans lost at Pearl Harbor.

The Ten Commandments monument was a gift of the Fraternal Order of Eagles, accepted by a joint resolution of the House and Senate in early 1961. It is a granite monument approximately six feet high and three and a half feet wide. In the center of the monument, a large panel displays a nonsectarian version of the text of the Commandments. Above this text, the monument contains depictions of two small tablets with ancient Hebrew script. There are also several symbols etched into the monument: just above the text, there is an American eagle grasping the American flag; higher still, there is an eye inside a pyramid closely resembling the symbol displayed on the one-dollar bill. Just below the text are two small Stars of David, as well as a symbol representing Christ: two Greek letters, Chi and Rho, superimposed on each other. Just below the text of the commandments, offset in a decorative, scroll-shaped box, the monument bears the inscription: "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

The parties stipulated that (1) the sparse legislative history "contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate Journal entries"; (2) the State selected the site on the recommendation of the Building Engineering and Management Division of the State Board of Control; (3) the expenses "were borne exclusively by the Eagles"; (4) the monument requires virtually no maintenance; and (5) the dedication of the monument was presided over by Senator Bruce Reagan

and Representative Will Smith. There is no official record that any other person participated.

The main entry into the Capitol Building is on its south side facing Congress Street. The monument displaying the Ten Commandments is located on the north side of the Capitol Building on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building.

II

The plaintiff argues that Texas "accepted" the monument "for the purpose of promoting the Commandments as a personal code of conduct for youths and [b]ecause the Commandments are a sectarian religious code, their promotion and endorsement by the State as a personal code contravenes the First Amendment." He asserts that the district court's finding that the State had a secular purpose for the display is not supported by the evidence and that a reasonable viewer would perceive the display of the decalogue as a State advancement and endorsement of religion favoring the Jewish and Christian faiths.

The State replies that the display serves a secular purpose as found by the district court and a reasonable observer would not conclude that the State is seeking to advance, endorse, or promote religion by its display. To the contrary, the State observes that the display has been in place without legal attack for over forty-two years and, viewed in context, is part of the state's commemorative display of significant events and strands of Texas history. It argues that a reasonable person touring the Capitol Building and its historical grounds would not see the

display of the decalogue as State endorsement of religion. Rather, with its simple presentation and location between the Capitol Building and the Texas Supreme Court Building, a reasonable viewer would see the monument as a recognition of the large role of the decalogue in the development of Texas law. Equally, with its proximity to the pioneer woman holding a child and to the figures of children at play, it would be seen as a fit location to express appreciation for the work of the Eagles with American youth.

III

Through the Fourteenth Amendment, Texas is controlled by the command of the First Amendment that it "shall make no law respecting an establishment of religion."[2] In its thirty-two year life, *Lemon v. Kurtzman*[3] has been criticized but remains a required starting point in deciding contentions that state displays of symbols and writings with a religious message are contrary to the First Amendment. Its three-part test requires that a court consider (1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion.[4] A challenged activity must survive each prong to pass constitutional scrutiny. The plaintiff here

[2] U.S. CONST. amend. I, cl. 1.

[3] 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[4] *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).

concedes that excessive entanglement, the third inquiry, is not an issue in this case. We need only consider, then, whether Texas lacked a secular purpose and whether the primary effect of the display is to advance religion.

In refining these two tests, the Supreme Court has interpreted the First Amendment to prohibit government action that has either the purpose or effect of endorsing or disapproving of religion.[5] A display has the purpose of endorsing religion when it "'convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred.'"[6] And to determine whether it has the effect of endorsing religion we ask "what viewers may fairly understand to be the purpose of the display."[7] This is the observation of a reasonable observer, not of the uninformed, the casual passerby, the heckler, or the reaction of a single individual. Rather, the reasonable observer standard attempts to capture the "concern with the political community writ large."[8]

[5] *County of Allegheny v. Am. Civil Liberties Union,* 492 U.S. 573, 600-01, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *Lynch v. Donnelly,* 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring).

[6] *Allegheny,* 492 U.S. at 593, 109 S.Ct. 3086 (quoting *Wallace v. Jaffree,* 472 U.S. 38, 70, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring)).

[7] *Allegheny,* 492 U.S. at 595, 109 S.Ct. 3086 (quoting *Lynch,* 465 U.S. at 692, 104 S.Ct. 1355 (O'Connor, J., concurring)).

[8] *See Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 779-780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort. . . . It is for this reason that the

(Continued on following page)

The guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another. Yet neutrality is not self-defining. It does not demand that the state be blind to the pervasive presence of strongly held views about religion with myriad faiths and doctrines. Nor could it do so. Religion and government cannot be ruthlessly separated without encountering other First Amendment constraints, including its guaranty of the free exercise of religion. Such hostility toward religion is not only not required; it is proscribed.[9] Justice Kennedy's observation in *Allegheny* bears emphasis: it is not the case that the Establishment Clause is so inelastic as to not "permit government some latitude in recognizing and accommodating the central role religion plays in our society."[10] It is equally important to remember Justice Goldberg's famous observation:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion. . . .[11]

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reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]."); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001).

[9] *See Lynch*, 465 U.S. at 673, 104 S.Ct. 1355.

[10] *Allegheny*, 492 U.S. at 657, 109 S.Ct. 3086 (Kennedy, J., concurring in part and dissenting in part).

[11] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring).

In sum, we recognize that proper application of First Amendment principles demands a sense of proportion and that our inquiry is fact-sensitive. Ultimately, we have the delicate task of placing this display of the decalogue in its full setting. We turn to that task, asking first if the Texas Legislature had a valid secular purpose for authorizing the installation of the monument. We will then examine whether the activity's primary effect advances or inhibits religion.

IV

A

The district court found that the purpose of the legislature was "to recognize and commend a private organization for its efforts to reduce juvenile delinquency." It gleaned this purpose from the reason stated in the Resolution granting the Eagles permission to erect the monument. The plaintiff concedes that this recited purpose is a valid secular purpose, but contends that it was not the true purpose. Rather, he argues that monuments "are not erected to honor donors and they are not erected to pay tribute [to] their acts of donation. They are erected to pay tribute to and honor the subject or ideal depicted."

The Legislature, of course, cannot dictate the finding of secular purpose by a bland recitation. The finding of the district court here, however, rests on two powerful realities. First, there is nothing in either the legislative record or the events attending the monument's installation to contradict the secular reasons laid out in the legislative

record, brief as it is; there is nothing to suggest that the Legislature did not share the concern about juvenile delinquency.[12] Second, Texas has a record of honoring the contributions of donors and those they represent, contrary to plaintiff's unsupported argument. For example, ten years before its resolution accepting the Ten Commandments monument, the Legislature authorized the Boy Scouts of America to install a replica of the Statue of Liberty. The Legislature stated that it did so "in honor of the Boy Scouts of America." The resolution's preamble explained that "nothing has been done to honor the youth of Texas who are members of the Boy Scouts." Whether or not this legislative history would support a finding that the Legislature acted with only a secular purpose, the record supports the finding of the district court that the Texas Legislature had a valid secular purpose in authorizing the placement of the Ten Commandments monument. There is nothing to suggest that the recited reason was a sham, and the State's treatment of other monuments on the Capitol grounds belies any such suggestion. Without more, then, the recited legislative purpose should be accepted.[13]

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[12] For an example of the decalogue's installation coupled with religious ceremony, *see Books v. City of Elkhart, Indiana,* 235 F.3d 292, 306 (7th Cir.2000), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001).

[13] *Wallace,* 472 U.S. at 74-75, 105 S.Ct. 2479; *see also Mueller v. Allen,* 463 U.S. 388, 394-395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (expressing "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.").

The plaintiff here argues that there is more. It can hardly be gainsaid, he contends, that in honoring the work of the Eagles in curbing juvenile misconduct by its resolution, the Texas Legislature endorsed the decalogue as a common code of conduct and implicitly promoted its religious message. This is half right. The plaintiff's contention here forgets that the Commandments have a secular dimension as well as a religious meaning. The plaintiff presumes both that its use by the Eagles was religious and that authorizing the installation of the monument itself endorsed that religious message.

The plaintiff's argument rests heavily upon the decision of the Seventh Circuit in *Books v. City of Elkhart, Indiana.*[14] In *Books,* there was evidence, found significant by the majority of its panel, that the purpose of the City of Elkhart was to promote the decalogue as a religious statement. The court found the City's statement of secular purpose suspect because it was adopted on the eve of litigation in an effort to escape scrutiny under the First Amendment. The Texas Resolution came in 1961 and was supported by statements honoring the efforts of the donor. Unlike *Books,* there was no religious service attending the acceptance of the monument in Texas. The record shows that only two state legislators attended. There is no evidence of any religious invocations or that any minister, rabbi, or priest were even present. Nor is the context in which the Commandments is displayed here similar to the

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[14] 235 F.3d 292, 306 (7th Cir.2000), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001).

display in *Books*.[15] We are not persuaded that the Resolution of the Texas Legislature in 1961 was a sham.

B

Our conclusion that the legislative authorization was supported by a valid secular purpose is reinforced by the related but distinct inquiry whether the primary effect of the display advances or inhibits religion as seen from the eyes of a reasonable observer, informed and aware of his surroundings.

The Ten Commandments have both a religious and secular message. Given this duality, our effects inquiry must focus on the specific facts and context of the display. As Justice Blackmun explained in *Allegheny*:

> [T]he effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display." That inquiry, of necessity, turns upon the context in which the contested object appears:
>
> "[A] typical museum setting, though not neutralizing the religious content of a religious

[15] As we discuss in greater detail below, the context in which the Ten Commandments is displayed on the Capitol grounds is different from that at issue in *Books*, and this unique context negates any sense that the state is endorsing or promoting the decalogue's religious, as opposed to its secular, aspects.

> painting, negates any message of endorsement of that content."[16]

Returning to our earlier description of the Capitol, we note first that the grounds are designated as a National Historic Landmark that is dedicated to the display of "statues, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today."[17] The State points to the replica of the Seal of Mexico displayed on the tour path of the Capitol, reminding that it "acknowledges the mystical traditions of the indigenous people of the Southwest, who were displaced by a religious Catholic regime for some 300 years."

Relatedly, the State suggests that the decalogue in Texas is displayed in a museum setting. The State points out that the Curator of the Capitol is a professional museum curator, with an advanced degree in museum science and the Texas State Preservation Board qualifies as a museum as defined by federal statute.[18] The State Preservation Board, created in 1983, is an agency of the State of Texas and has broad authority over the Capitol

[16] *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086 (citing *Lynch v. Donnelly*, 465 U.S. at 687, 104 S.Ct. 1355 (O'Connor, J., concurring, embracing Justice O'Connor's concurring opinion in *Lynch*)).

[17] *See* H. Con. Res. 38, 77th Leg., R.S. (2001).

[18] "Museum means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or aesthetic purposes that utilizes a professional staff, owns or utilizes tangible objects, cares for the tangible objects, and exhibits the tangible objects to the public on a regular basis." 20 U.S.C. § 9172 (2003).

Building and grounds.[19] It employs, among others, three professional curators with graduate degrees in history and museum science. They maintain the historic artifacts of the Capitol Collection, including an art collection with an estimated value of twenty to thirty million dollars. This department oversees the monuments and offers educational programs and brochures, including guided tours of the Capitol Building.

We need not accept the State's museum analogy in full measure to acknowledge that, while short of the museum envisioned by Justice O'Connor, a setting which would wholly negate endorsement, the manner in which the seventeen monuments are presented on the grounds portion of the Capitol tour supports the conclusion that a reasonable viewer would not see this display either as a State endorsement of the Commandment's religious message or as excluding those who would not subscribe to its religious statements.[20]

Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon

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[19] Tex. Gov't Code Ann. §§ 443.001-443.028 (Vernon 1998 & Supp.2004).

[20] A visitor to the Capitol would receive a brochure including "A Self-Guided Tour" with a map showing the location of the seventeen monuments. It includes a brief description of each monument, starting with Hood's Texas Brigade, which "was erected in 1910 by surviving comrades and friends." Similar paragraphs follow for each monument. Number 9 reads: "THE TEN COMMANDMENTS – Erected 1961 by the Fraternal Order of Eagles of Texas. Hewn from Texas granite in the traditional shape of the biblical stones and inscribed with the Ten Commandments, the monument was presented to the people and youth of Texas."

the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society. A reasonable viewer must also be aware of the placement of the monument at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building. It is plainly linked with those houses of the law while standing apart and not physically connected to any of them. The decalogue is presented as relevant to these law-giving instruments of State government, but from a distance.

In 1993, the State Preservation Board had to decide where to locate the monument following a Capitol construction project that had required the removal of many monuments. The Board's executive director, in uncontroverted testimony at trial, explained that the decalogue's location was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law. The only change in where the monument had been located since 1961 was to turn it to face a different direction. The professional judgment of these trained museum curators, made ten years before any litigation, is relevant to our question of effect, as well as to our acceptance of the State's secular purpose in displaying the Commandments. But even if the evidence of the efforts in 1993 were disregarded, it would not diminish the explanatory power of the location where the monument was placed in 1961 and has since resided.

V

History matters here. For forty-two years, the monument has stood in Austin without the filing of any legal complaint. This quiescence is remarkable for Travis County, the seat of state government and the home of the University of Texas, whose campus is a stone's throw away from the Capitol grounds. This Court is well aware that Travis County is not lacking in persons willing and able to seek judicial relief from perceived interferences with constitutional rights.[21] Had this monument been recently installed, the inference of religious purpose would have been stronger. That it has been in place for so long adds force to the contention that the legislature had a secular purpose. As Judge Becker observed:

> The reasonable observer would perceive an historic plaque as less of an endorsement of religion than a more recent religious display *not* because the Ten Commandments have lost their religious significance, but because the maintenance of this plaque sends a much different message about the religious views of the County. . . . The reasonable observer, knowing the age of the . . . plaque, would regard the decision to leave it in place as motivated, in significant part, by the desire to preserve a longstanding plaque.[22]

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[21] *See e.g. O'Hair v. Murray,* 588 F.2d 1144 (5th Cir.1979) (addressing a constitutional challenge to the motto "In God We Trust"); *Murray v. City of Austin, Texas,* 947 F.2d 147 (5th. Cir.1991) (examining a claim that the inclusion of a Christian cross in the insignia of the City of Austin violated the Establishment and Free Exercise Clauses).

[22] *Freethought Soc. of Greater Philadelphia v. Chester County,* 334 F.3d 247, 265 (3rd Cir.2003).

In sum, we are persuaded that Texas does not violate the First Amendment by retaining a forty-two-year-old display of the decalogue. The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government. We are not persuaded that a reasonable viewer touring the Capitol and its grounds, informed of its history and its placement, would conclude that the State is endorsing the religious rather than the secular message of the decalogue.

To say this is not to diminish the reality that it is a sacred text to many, for it is also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people. The power of that counsel is evidenced by its expression in the civil and criminal laws of the free world. No judicial decree can erase that history and its continuing influence on our laws – there is no escape from its secular and religious character. There is no constitutional right to be free of government endorsement of its own laws. Certainly, we disserve no constitutional principle by concluding that a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed – replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment. A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the

decalogue's divine origin. Yet in context even that message does not drown its secular message. So it is here.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-51184

THOMAS VAN ORDEN

Plaintiff-Appellant

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; DAVID DEWHURST, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; TOM CRADDICK, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; CHRIS HARRIS, in his official capacity as Member of the State Preservation Board; PEGGY HAMRICK, in her official capacity as member of the State Preservation Board; JOCELYN LEVI STRAUS, in her official capacity as member of the Texas Preservation Board; CHARLYNN DOERING, in her official capacity as Interim Executive Director, State Preservation Board

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 5, 2004)

(Opinion 11/12/03 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, STEWART, and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

REHG-6a

APPENDIX C

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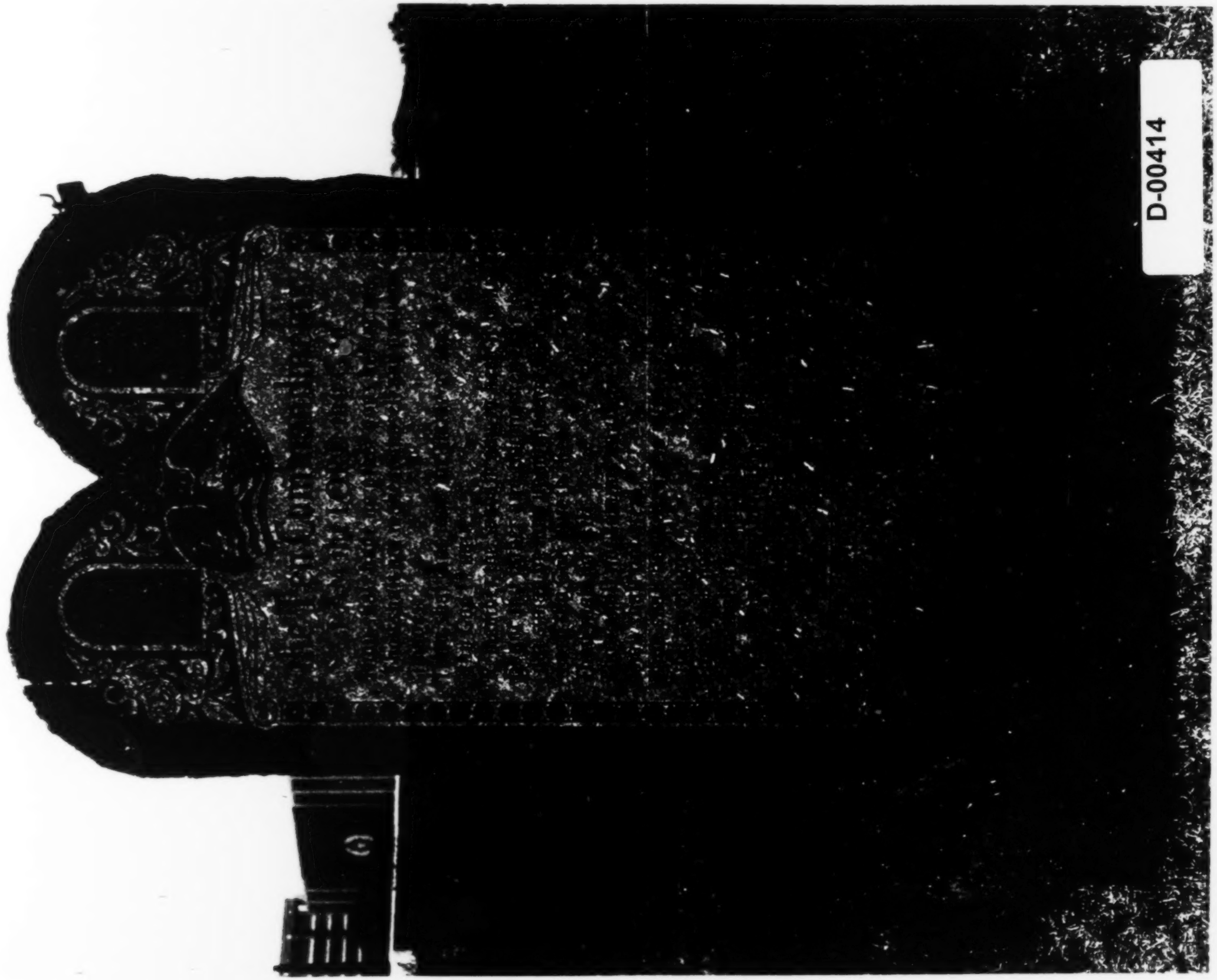

APPENDIX D

2002 U.S. DIST. LEXIS 26709

THOMAS VAN ORDEN, Plaintiff, v. RICK PERRY, et al., Defendants.

NO. A-01-CA-833-H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

October 2, 2002, Decided
October 2, 2002, Filed

COUNSEL: THOMAS VAN ORDEN, plaintiff, Pro se, Austin, TX.

For RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, BILL RATLIFF, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas, JAMES E. "PETE" LANEY, in his official capacity as Co-Vice Chairman, State Preservation Board and speaker of the House of Representatives of Texas, DAVID CAIN, in his official capacity as Member of the State Preservation Board. TONY GOOLSBY, in his official capacity as Member of the State Preservation Board, JOCELYN LEVI STRAUS, in her official capacity as Member of the Texas Preservation Board, RICK CRAWFORD, in his official capacity as Executive Director, State Preservation Board, defendants: Michael Winget-Hernandez, Office of the Attorney General, Austin, TX.

For LIBERTY COUNSEL, amicus: Mathew D. Staver, Longwood, FL.

For LIBERTY COUNSEL, amicus: Kathleen A. Cassidy Goodman, Law Office of Kathleen Cassidy Goodman, San Antonio, TX.

JUDGES: HARRY LEE HUDSPETH, SENIOR UNITED STATES DISTRICT JUDGE.

OPINION BY: HARRY LEE HUDSPETH

OPINION:

MEMORANDUM OPINION AND ORDER

"Ship me somewhere east of Suez, where the best is like the worst. Where there ain't no Ten Commandments, an' a man can raise a thirst."

Mandalay by Rudyard Kipling

This is a civil action for injunctive and declaratory relief under 42 U.S.C. § 1983. Plaintiff Thomas Van Orden is a law school graduate and was at one time a licensed lawyer. His law license is presently inactive. The Defendants are Rick Crawford, who is the Executive Director of the State Preservation Board, and the six members of that Board. This Board is responsible for the maintenance and upkeep of the Texas State Capitol and its grounds. In his complaint the Plaintiff alleges that the Defendants are permitting to be displayed on the grounds of the State Capitol a granite monument on which is engraved a version of the Ten Commandments. The Plaintiff contends that this display on state property violates the *Establishment Clause of the First Amendment*[1] made applicable to

[1] "Congress shall make no law respecting an establishment of religion. . . ."

the states by the *Fourteenth Amendment*. The Plaintiff requests[2] that this Court enter a declaratory judgment to that effect and also issue a mandatory injunction requiring the removal of the Ten Commandments monument from display on the grounds of the Capitol.

The history of the Ten Commandments monument that stands on the Capitol grounds is not in dispute among the parties and may be quickly summarized.

In the 1950s and early 1960s, the Fraternal Order of Eagles, a national social, civic, and patriotic organization, launched a project of donating granite monuments similar to the one in issue here to states, counties, and cities all over the United States. Many of these monuments were accepted by those governmental entities, and were erected on the grounds of state capitols, county courthouses, municipal buildings, and public parks throughout the United States. The particular Ten Commandments monument of which the Plaintiff complains in this case was offered to the State of Texas by the Fraternal Order of Eagles in 1961. The Texas Legislature accepted the donation of the monument, and it was installed very near its present location northwest of the rotunda of the State Capitol Building. The specific location was recommended by the Building Engineering and Management Division of the State Board of Control (Exhibit 2).[3] The physical labor and cost of installation were borne by the Fraternal Order

[2] Ironically, the Plaintiff "prayed" for this relief. (Second Amended Complaint, page 6).

[3] Prior to the creation of the State Preservation Board, the State Board of Control was the organization responsible for the maintenance and upkeep of the State Capitol grounds.

of Eagles. The monument remained in place until June, 1990, at which time it had to be removed and stored to permit the excavation necessary to construct the Capitol extension. It was reinstalled in its previous location on March 26, 1993. For reasons that are not clear from the record, however, upon reinstallation the monument was turned around to face roughly southwest. The Ten Commandments monument is one of seventeen monuments and memorials which stand on the grounds of the State Capitol and for the maintenance of which the State Preservation board is responsible.[4] Six monuments other than the Ten Commandments monument are also located in the northwest quadrant of the State Capitol grounds.[5]

The physical appearance of the Ten Commandments monument is illustrated by the photograph admitted in evidence as Exhibit 21. It is a granite monolith, more than six feet high and more than three feet wide. One side of the monument contains no engraving and is smooth. Engraved on the other side is a version of the Ten Commandments without any "chapter and verse" citation to the Old Testament and with no identification of the specific English translation of the Old Testament from which the wording is taken. On the upper part of the monument, above the wording of the Ten Commandments, appear some words in the Hebrew language, an American

[4] Like the Ten Commandments, most of the other monuments were gifts from private organizations.

[5] The other six monuments are a tribute to Texas children, a tribute to the Texas pioneer woman, a replica of the Statue of Liberty, a memorial to the veterans of Pearl Harbor, a memorial to the Korean War veterans, and a memorial to the soldiers of World War I.

flag, an eagle, and a human eye inside a pyramid, similar to the picture on the back of the One Dollar Federal Reserve Note. On the lower part of the monument are found two stars of David and the superimposed Greek letters Chi and Rho, a symbol used in the first century Christian Church to represent Jesus Christ. Finally, on a carving representing a scroll, the following words are engraved: "Presented to the People and Youth of Texas by the Fraternal Order of Eagles of Texas 1961".

A threshold question in this case, as in every case of this type, is the standing of the Plaintiff to bring the suit. *Article III, Section 2 of the Constitution* limits the judicial power of the United States to actual cases and controversies. No authority is given to decide hypothetical cases or to issue advisory opinions. Plaintiff Van Orden must first show, therefore, that he personally has standing to challenge the display of the Ten Commandments monument on the grounds of the State Capitol. In constitutional terms, this means that he must demonstrate that he personally has suffered some actual or threatened injury as a proximate result of the Defendants' conduct and that such injury is likely to be redressed by a favorable decision. ***Valley Forge Christian College v. Americans for Separation of Church and State, Inc.***, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982); ***Murray v. City of Austin, Texas***, 947 F.2d 147, 151 (5th Cir. 1991). In an effort to establish standing in the instant case, Plaintiff Van Orden testified that since 1995 he has made frequent use of the Texas State Law Library located in the State Supreme Court Building just northwest of the Capitol. For the past two years in particular, the frequency of those library visits has averaged twice a week. These visits bring the Plaintiff into frequent, and according to him

unwelcome, contact with the Ten Commandments monument. The Plaintiff reports that as he enters the Supreme Court Building from the east, the Ten Commandments monument is viewable to his left. He also crosses with some frequency from the Supreme Court Building to the Capitol Building itself, which forces him to pass the Ten Commandments monument both going and coming. The Plaintiff testified that these contacts are offensive to him, in that he is not religious; he does not acknowledge the existence of any god, and he specifically does not adhere to either the Christian faith or the Jewish faith. In the Plaintiff's eyes, the existence of the Ten Commandments monument on the grounds of the State Capitol symbolizes a state policy to favor the Jewish and Christian religions over other religions and over non-believers, which "policy" the Plaintiff finds to be personally offensive and also contends is prohibited by the *Establishment Clause*. In light of the very liberal interpretation which the courts have given to the concept of standing in *Establishment Clause* cases, the Court finds that Plaintiff Van Orden has succeeded in crossing the threshold and demonstrating his standing to bring this suit. **See, e.g., *Murray v. City of Austin, Texas, supra*** at 151-52.

One remarkable aspect of the Plaintiff's testimony was his admission that he had been aware of, and offended by, the Ten Commandments monument since approximately 1995. Nevertheless, he waited until December, 2001 to file this suit. If the Plaintiff has the right to request removal of the monument on *Establishment Clause* grounds, he certainly slept on that right for a long time. Because the relief he seeks is equitable in nature, it is necessary to consider the doctrine of laches. The Courts today generally define laches as an inexcusable delay that

results in prejudice to the defendant. ***Conan Properties, Inc. v. Conans Pizza, Inc.***, 752 F.2d 145, 153 (5th cir. 1985). The doctrine of laches has three elements: (1) that the plaintiff delayed in asserting his right; (2) that his delay was inexcusable; and (3) that undue prejudice resulted from the delay. ***Elvis Presley Enterprises, Inc. v. Capece***, 141 F.3d 188, 205 (5th Cir. 1998). Even constitutional claims may sometimes be barred by laches. ***Soules v. Kauaians for Nukolii Campaign Committee***, 849 F 2d 1176, 1182 (9th Cir. 1988); ***Gay Men's Health Crisis v. Sullivan***, 733 F. Supp. 619, 631 (S.D N.Y. 1989). In the instant case, assuming for the sake of argument that the Plaintiff waited an unreasonable length of time to bring his suit, and that his delay was inexcusable, it does not appear that the Defendants were prejudiced by that delay. The monument itself did not change during that six and one-half year period; it stands today as it did in 1995. Furthermore, there is no indication that any evidence was available in 1995 that became unavailable by 2001. **See *Costello v. United States***, 365 U.S. 265, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961). The Court finds that the Plaintiff's cause of action is not barred by the doctrine of laches.

Having concluded that the Plaintiff has standing to bring this suit, and that it is not barred by laches, we turn to the merits of the case and ask the central question: Does the continued display of the FOE-donated Ten Commandments monument on the grounds of the State Capitol contravene the *Establishment Clause of the First Amendment*? In attempting to answer that question, we do not write on a clean slate (or a smooth tablet). Over the past thirty years, several courts have been presented with the same question concerning the same monument

donated by the Fraternal Order of Eagles. The decisions, however, are not in harmony. Displaying the monument on government property has been approved in the Tenth Circuit, ***Anderson v. Salt Lake City Corporation***, 475 F.2d 29 (10th Cir. 1973), and disallowed in the Seventh Circuit. ***Books v. City of Elkhart, Indiana***, 235 F.3d 292 (7th Cir. 2000), **cert. denied** 532 U.S. 1058, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001). The Fifth Circuit has not ruled on the issue, and the Supreme Court, to the chagrin of some of its members, has assiduously avoided it. *City of Elkhart, Indiana v. Books*, 532 U.S. 1058, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001) (Rehnquist, C.J., Scalia, J., and Thomas, J., dissenting from denial of certiorari). The answer must be sought from other Supreme Court opinions interpreting the *Establishment Clause*.

A popular professor of Constitutional Law, Dr. Caleb Perry Patterson, once proposed the following interpretation of the *Commerce Clause*. "The state can tax interstate commerce, but not too much!" Interpretations of the *Establishment Clause* seem to occupy the same twilight zone of imprecision. The Supreme Court itself has recognized that the line which separates church and state is a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". ***Lemon v. Kurtzman***, 403 U.S. 602, 615, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). Indeed, the blurred and indistinct nature of this line of separation has resulted in some vividly contrasting decisions over the years. For example, the Court has held that allowing the display of a nativity scene on the staircase of a county courthouse at Christmas time runs afoul of the *Establishment Clause*, ***County of Allegheny v. ACLU, Greater Pittsburg Chapter***, 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989), but that

using state funds to pay the wages of a Presbyterian minister to server as a chaplain to the state legislature and to open each session with a prayer does not contravene the *Establishment Clause*. ***Marsh v. Chambers***, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983).

In ***Lemon v. Kurtzman, supra***, the Supreme Court announced a three-prong test to be applied when a claim was made that a state action violated the *Establishment Clause*. In the thirty years since **Lemon** was decided, several individual members of the Court have criticized the **Lemon** test, and the entire Court has simply ignored it on some occasions. **See *Lynch v. Donnelly***, 465 U.S. 668, 679, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984). Nevertheless, it remains the starting point in analyzing *Establishment Clause* controversies. In order to pass muster under the **Lemon** test, a state statute, policy, or action (1) must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not lead to excessive government entanglement with religion. ***Lemon v. Kurtzman, supra*** at 612-13. In the instant case, the parties agree that the third prong of the **Lemon** test, "entanglement" is not in issue. It is only necessary, therefore, to focus on the first and second prongs of the **Lemon** test.

The first question is whether the State of Texas had a secular purpose in accepting the Ten Commandments monument and in permitting and continuing to permit its display. Case law does not require that a state's purpose be "exclusively secular". ***Lynch v. Donnelly, supra*** at 681 n. 6.; ***Wallace v. Jaffree***, 472 U.S. 38, 56, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985). It is only required that the secular purpose be bona fide, legitimate, and not a mere sham.

Lynch v. Donnelly, supra at 681, ***American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board***, 243 F.3d 289, 308 (6th Cir. 2001); ***American Jewish Congress v. City of Chicago***, 827 F.2d 120, 126-27 (7th Cir. 1987); ***Anderson v. Salt Lake City Corporation, supra*** at 34. In the instant case, the best evidence of the State's purpose is found in Senate Concurrent Resolution Number Sixteen, the legislative act which permitted the Fraternal Order of Eagles to place the Ten Commandments monument on the Capitol grounds. The resolution was adopted by the Texas Senate on February 14, 1961, by the Texas House on February 22, 1961, and was signed by the governor on March 10, 1961. The pertinent language of the resolution is "that the Fraternal Order of the [sic] Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas" (Exhibit 1). In one of the "whereas" clauses, the resolution also notes that the purpose of the Eagles organization in donating the monument was "to promote youth morality and to help stop the alarming increase in delinquency" (Exhibit 1). The State's purpose as revealed by the language of the concurrent resolution was a legitimate secular purpose, to wit: to recognize and commend a private organization for its efforts to reduce juvenile delinquency. The Plaintiff has produced no convincing evidence that the stated purposes was a sham. The Court finds that a bona fide and valid secular purpose has been shown.

The Defendants have invited the Court to find yet another legitimate secular purpose in the State's decision

to accept and display the monument. They argue that the Ten Commandments, as an ancient legal code encompassing secular as well as religious precepts, is part of the foundation of modern secular law in Texas and elsewhere. The Court agrees that this would have been a legitimate secular purpose. However, there is no evidence that the Legislature, the State Preservation Board, or any other department or responsible official of the State of Texas has ever advanced such a purpose. In fact, the only evidence the Defendants can offer in support of this alleged purpose is the May 15, 1961 memorandum from the Building Engineering and Management Division recommending a location for the monument between the Capitol rotunda and the Supreme Court Building (Exhibit 2). Having found no reference to the influence of the Ten Commandments on secular law in the proceedings of the Texas Legislature, or of the State Preservation Board, or of any other agency of the State of Texas, the Court must find that the evidence fails to support the existence of such a purpose on the part of the State of Texas.

Since **Lemon v. Kurtzman** was decided more than thirty years ago, the second prong of the **Lemon** test has undergone some refinements. Whereas **Lemon** asks the question whether a practice has the principal or primary effect of advancing or inhibiting religion, 403 U.S. at 612-13, more recent Supreme Court decisions speak in terms of whether a challenged governmental practice has the purpose or effect of "endorsing" religion. ***County of Allegheny v. ACLU, Greater Pittsburg Chapter, supra*** **at 593. See also** ***Capitol Square Review and Advisory Board v. Pinette***, 515 U.S. 753, 764, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995); ***Murray v. City of Austin, Texas, supra*** at 156. It is clear that the endorsement test cannot

be applied in a vacuum. Instead, the Court must attempt to view each situation from the standpoint of a reasonable observer, mindful of the history, purpose and context of the intersection between state and religion which is under examination. ***Murray v. City of Austin, Texas, supra*** at 156.

The history and purpose of the Ten Commandments monument has already been discussed. Senate Concurrent Resolution Number Sixteen (Exhibit 1), which formally accepted the Ten Commandments monument from the Fraternal Order of Eagles, makes no reference to religion. Neither the Senate journal nor the House journal contains any record of discussion or debate about the monument or the reasons for its acceptance by the Legislature on behalf of the State of Texas (Exhibit 1). When the monument was actually installed on the Capitol grounds, Senator Bruce Reagan and Representative Will Smith presided over the formal dedication. There is no record of participation by any other person in the dedication ceremonies. Specifically, there is no record of participation in the ceremony by any Christian clergyman or Jewish rabbi. **Compare *Books v. City of Elhart, Indiana, supra*** at 303.

Also relevant to a discussion of the history of the monument is the fact that in 1986, twenty-five years after the erection of the monument, the United States Secretary of the Interior designated the Texas State Capitol and its grounds as a National Historic Landmark (Exhibit 3). This designation served to place the Capitol and its grounds in the National Register of Historic Places, and brought it within the provisions of the *National Historic Preservation Act of 1966* (Exhibit 3). This designation lends support to the Defendants' contention that the State Capitol and its grounds are the functional equivalent of a

museum (Transcript pp. 57-58). **See *Lynch v. Donnelly, supra*** at 677-78.

Neither the location nor the physical characteristics of the Ten Commandments monument would lead a reasonable observer to conclude that the State is seeking to advance, endorse or promote religion by permitting its display. Unlike many of the sixteen other monuments with which it shares the Capitol grounds, the Ten Commandments monument does not bear the state seal of Texas, or even the Lone Star which is symbolic of the State. The only explanation of its presence is the proclamation that it was presented to the State by a private civic and service organization in 1961. The precise location of the monument is also significant. The Capitol building faces south, and the south entrance is considered the main entrance. The great majority of visitors to the State Capitol and its grounds approach from the south or the east. The Ten Commandments monument is located in the northwest quadrant of the Capitol grounds, well off the usual beaten path for tourists. Indeed, but for the publicity generated by the present litigation, most visitors to the State Capitol and most residents of the State of Texas would have been unaware of the existence of the Ten Commandments monument. It is safe bet that over the years many of those who were aware of the monument were, like the Plaintiff himself, lawyers in transit between the Supreme Court Building and the Capitol rotunda. Whatever the reason, it is noteworthy that the monument was in place for more than forty years before any individual or organization complained about it. The Plaintiff admits that he personally observed the monument for more than six years before he protested its presence by filing this suit. These facts significantly undermine the Plaintiff's contention that the

very existence of the monument sends "a clear message that, politically, there are ins and outs in Texas based on personal religious beliefs" (Plaintiff's trial brief page 5). Viewed in the proper context, and in light of its history, this passive monument cannot be said to advance, endorse, or promote religion to a degree that would require the drastic remedy of ordering the Defendants to remove it from the Capitol grounds. "The wholesome neutrality guaranteed by the Establishment and *Free Exercise Clauses* does not dictate obliteration of all our religious traditions." ***Anderson v. Salt Lake City Corporation, supra*** at 34.

It is therefore ORDERED that the Plaintiff's request for injunctive and declaratory relief in the above-styled and numbered cause be, and it is hereby, DENIED.

It is further ORDERED that judgment be, and it is hereby, ENTERED in favor of the Defendant, and that the Plaintiff take nothing by his suit.

SIGNED AND ENTERED this 2nd day of October, 2002.

HARRY LEE HUDSPETH

SENIOR UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the Memorandum Opinion and Order this day entered in the above-styled and numbered cause,

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, ENTERED for the Defendants, and that the Plaintiff take nothing by his suit.

SIGNED AND ENTERED this 2nd day of October, 2002.

HARRY LEE HUDSPETH

SENIOR UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUL 6 - 2004
OFFICE OF THE CLERK

No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Texas Capitol, including its surrounding twenty-two acres, was dedicated in 1888. *See* Pet. App., at 2. Three years later, the first monument was built on the grounds and dedicated to Texans who died at the Alamo. *See id.* Seventeen monuments now adorn the Capitol grounds, which is listed on the National Registry of Historic Places and designated a protected National Historic Landmark.[1] *See id.* at 3.

The State Preservation Board is charged with preserving, maintaining, and promoting the cultural resources of the Capitol and its grounds. The Board hires a professional curator, who is given the duties of cataloguing and preserving the contents of the Capitol buildings and grounds. *See* TEX. GOVT. CODE § 443.006.

Visitors to the Capitol may take a guided tour of the Capitol building, which contains historic statues, portraits, and other memorabilia, and they may take a self-guided tour of the outdoor displays. *See* Pet. App., at 3. The tour of the Capitol building includes numerous monuments, plaques, and seals portraying both the religious and secular history of Texas. *See id.* They include a tribute to African-American legislators, a Confederate plaque, a plaque commemorating the donors of granite for the building, and a plaque commemorating the war with Mexico. *See id.* A Six Flags Over Texas display on the floor of the Capitol rotunda

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1. The purpose of the National Historic Preservation Program is to preserve "for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. §461. "Only 3% of properties listed in the National Register of Historic Places are designated as National Historic Landmarks," and these places are considered "an irreplaceable legacy to [present] and future generations." NAT'L PARKS SERV., U.S. DEP'T INTERIOR, NATIONAL HISTORIC LANDMARKS PROGRAM, *at* http://www.cr.nps.gov/nhl/publications/bro2.htm (last visited July 1, 2004).

features the Mexican eagle and serpent—a religious symbol of Aztec prophecy[2]—as well as the Confederate seal inscribed with "Deo Vindice" (God will judge). *See id.* Visitors to the Supreme Court building would find "Sicut Patribus, Sit Deus Nobis" ("As God was to our fathers, may He also be to us") inscribed above the Justices' bench. *See id.*

In 1961, the Texas chapter of the Fraternal Order of Eagles donated a Ten Commandments monument "to the Youth and People of Texas" to be erected on the Capitol grounds. Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195, 1195–96; Resp. Br. App., at 1a. In accepting the gift from the Eagles and granting permission to erect the monument, the Legislature officially "congratulated" the Eagles "for [their] efforts and contributions in combating juvenile delinquency throughout our nation." *Id.*, at 1a. Texas House Representatives Wil Smith and Senator Bruce Reagan dedicated the monument. *See* Pet. App., at 4. No evidence exists to suggest that the dedication ceremony included any religious references, nor is there evidence that any clergy participated in the ceremony. *See id.*, at 5, 11.

The Ten Commandments monument sits between the Supreme Court building and the Capitol. Six other monuments fall in the same vicinity: a tribute to the children of Texas, a statue of a pioneer woman holding a child in tribute to the role of women in Texas history, a replica of the statue of liberty in tribute to the Boy Scouts of America, a tribute to Korean War veterans, a tribute to veterans of World War I, and a monument to the Texans who died

2. In the center of the Mexican flag lies a brown eagle with a snake in its beak, perched on a cactus growing from a rock surrounded by water. The depiction derives from Aztec mythology, regarding the site for the foundation of their theocratic capital at Tenochtitlán, which is now Mexico City. Pet. App, at 3. This religious display is neither Jewish nor Christian, but native to Texas long before the arrival of those faiths.

at Pearl Harbor. *See* 1R 323. These monuments, along with the rest of the seventeen monuments on the Capitol grounds, constitute "statutes, memorials, and commemorations of people, ideals, and events that compose Texan identity." H. Con. Res. 38, 77th Leg., R.S. (2001).

The petition accurately describes the physical characteristics of the monument. The Building and Engineering Management Division of the State Board of Control decided that the monument should be erected on the south Capitol grounds between the Capitol and the Supreme Court Building. *See* Pet. App., at 4, 15. In its original orientation, the monument faced the back, or North, door of the Capitol, so that a person looking toward the Northwest from that door might see the monument. The text of the monument, however, would not have been legible from that vantage point, because of its size and distance from the building. 1R 323. The monument requires virtually no maintenance. Pet. App., at 4.

In 1990, during the Capitol restoration project, the Ten Commandments monument was removed from its customary location and stored for its protection. 1R 323. After the completion of the project, the monument was returned to its original location, except that, at the direction of the Curator, it was oriented toward the southwest instead of toward the southeast, so that it would face the newly-created sidewalk. Pet. App., at 15. A practical result of the change in the monument's orientation is that its text is visible only to persons approaching the monument from the direction of the least-used, west entrance of the Capitol. 1R 333.

Some monuments that were present on the Capitol grounds before the restoration project were not replaced after the project's completion. *See* Master Plan, Historic Grounds of the Texas Capitol, at 51-53. The object of the restoration was to restore the most important portions of the Capitol's Historic Grounds (the Great Walk and the Oval Walk Precincts) to their condition as of

1915. *See id.*, at 51-53. Displays built in those areas after 1915 were either removed or moved to other locations on the Capitol grounds. *Id.*, at 51. Monuments, such as the Ten Commandments display, located on the Historic Grounds but not within the Great Walk and Oval Walk Precincts were retained only if they had been erected within 50 years of the restoration period, *i.e.* by 1965. *See id.*, at 53. Examples of monuments that were not returned to the Capitol grounds after the restoration project are the Austin Lawyers' Wives' Star and the Realtors' Centennial Monument, both of which were established after 1965. *See* Transcript, at 114.

SUMMARY OF ARGUMENT

Last Term, the State of Texas, as *amicus curiae* in *Russ v. Adland*, No. 02-1241, urged the Court to grant Kentucky's petition for certiorari and determine the constitutionality of a public display of the Ten Commandments. For many decades, Texas urged, state and local governments have chosen to acknowledge and memorialize the historical and cultural contributions of the Ten Commandments to the development of western legal codes. At that time, the Sixth Circuit had struck down Kentucky's monument and, in so doing, had furthered the significant and growing split of authority among the courts of appeals and state courts regarding the constitutionality of government displays of the Ten Commandments. As our *amicus* brief explained, the split was "clear, wide, and deep." Not only had the courts come to opposite constitutional conclusions regarding virtually identical displays, but they had also differed starkly in their analysis of almost every aspect of the test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Now, one year later, in the role of Respondent defending its own display of the Ten Commandments—having prevailed in the court below—Texas again asks the Court to decide this important question. Since last Term, the split of authority regarding the

constitutionality of government displays of the Ten Commandments has only deepened and widened. Moreover, the near constant stream of litigation regarding Ten Commandments displays demonstrates the unabating importance of this issue. Accordingly, the State acquiesces in certiorari.

Due to the particular context of the Texas monument, this case provides the Court an appropriate opportunity to resolve the growing conflict among the lower courts and to reaffirm that government may permissibly recognize the role of religion as a foundational aspect of our nation's law and culture. This case was tried on a stipulated record, is free of vehicle problems, concerns an Eagles monument virtually identical to those struck down in other circuits, and presents the facts and circumstances most favorable to upholding the display of the Ten Commandments. The Court should grant certiorari and affirm the judgment of the court below.

ARGUMENT

I. THERE IS A SIGNIFICANT SPLIT AMONG THE COURTS OF APPEALS AS TO WHETHER TEN COMMANDMENTS DISPLAYS VIOLATE THE ESTABLISHMENT CLAUSE.

Last Term, Texas pointed out the pronounced split among the courts of appeals regarding the constitutionality of Ten Commandments monuments. *See generally* Br. of Amicus Curiae the State of Texas *et al.* in *Russ v. Adland*, No. 02-1241, at 6-12. At that time, the Sixth and Seventh Circuits had held that such monuments violated the Establishment Clause. *See Adland v. Russ*, 307 F.3d 471 (CA6 2002), *cert. denied*, 538 U.S. 99 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (CA7 2001), *cert. denied*, 534 U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F.3d 292 (CA7 2000), *cert. denied*, 532 U.S. 1058 (2001). On the other side of the split, the Tenth Circuit, joined by the Colorado Supreme Court, had held similar monuments constitutional. *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (CA10 1973);

Colorado v. Freedom From Religion Found., 898 P.2d 1013 (Colo. 1995).

In the past year, the split has deepened to include decisions by two other courts of appeals. The Third and Fifth Circuits have now aligned with the Tenth in upholding displays of the Ten Commandments. *See Freethought Soc'y of Greater Pa. v. Chester County*, 334 F.3d 247 (CA3 2003); *Van Orden v. Perry*, 351 F.3d 173 (CA5 2003).[3]

The split among the courts of appeals could hardly be more stark, given that the monument in *Van Orden* is *virtually identical* to those in *Adland*, *Books*, *Anderson*, and *Colorado*—all were donated by the Fraternal Order of Eagles during the 1950s and 1960s. All have essentially the same dimensions, the same text, and the same symbols on their face. And yet, in the Sixth and Seventh Circuits, the Eagles monuments are unconstitutional, while in the Tenth and Fifth (and Colorado Supreme Court),[4] those very same monuments are not.

Moreover, these varying constitutional results regarding virtually identical monuments were reached after ostensibly applying the very same legal framework—the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

By its terms, the first two prongs of the *Lemon* test ask (1) whether the challenged state action has a secular purpose, and (2)

3. The Eighth Circuit had joined the Sixth and Seventh Circuits in striking down a Ten Commandments monument. *See American Civ. Liberties Union Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (CA8 2004). However, on April 6, 2004, after the petition for certiorari was filed in this case, the Eighth Circuit vacated the panel's opinion in *Plattsmouth* and granted the city's petition for rehearing *en banc*.

4. Moreover, as of this year, in the Third Circuit, a plaque containing the Ten Commandments is likewise constitutional. *Freethought*, 334 F.3d, at 269.

whether the primary effect of the state action advances or inhibits religion. *Id.*, at 612. The Court has subsequently distilled *Lemon*'s first two prongs to mean that government may take no action that has the purpose or effect of endorsing or disapproving religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).[5]

One year ago, the courts of appeals disagreed on the application of virtually every facet of the *Lemon* test to these Ten Commandments monuments. As an initial matter, the courts of appeals diverged regarding the character of the text of the Ten Commandments itself. The Seventh Circuit found the Decalogue to be "inherently religious" text that cannot "be stripped of [its] religious, indeed sacred, significance and characterized as a moral or ethical document." *Books*, 235 F.3d, at 302. This conflicts with the Tenth Circuit's view of the Ten Commandments as "at once religious and secular" and as having "substantial secular attributes," *Anderson*, 475 F.2d, at 33, and with the Colorado Supreme Court's opinion that the Decalogue represents secular history and natural law, *Colorado*, 898 P.2d, at 1024.

5. Under this Court's precedents, a government display has the purpose of endorsing religion if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S., at 593; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment). In determining whether a government display has the effect of endorsing religion, the question is "what viewers may fairly understand to be the purpose of the display." *Allegheny*, 492 U.S., at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). And that question is evaluated by the objective standard of the reasonable observer, deemed to be informed of the history and context of the display in question. *Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Now, the disagreements are even more pronounced. In *Van Orden*, the Fifth Circuit joined the Tenth, noting that the decalogue "is a sacred text to many [and] also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people." 351 F.3d, at 182. Similarly, the Third Circuit has recognized that the Ten Commandments are regarded as having "an independent secular meaning in our society." *Freethought*, 334 F.3d, at 267.

The courts also disagree over the underlying purpose of erecting Ten Commandments monuments. *Anderson*[6] and *Colorado* both found ample secular purposes in erecting Eagles monuments, given the Ten Commandments' "substantial secular attributes," 475 F.2d, at 33, "expressions of universal standards of behavior common to all western societies," and "large role in the development of the common law and . . . national constitution," 898 P.2d, at 1024.

In contrast, the Sixth and Seventh Circuits relied principally on this Court's decision in *Stone v. Graham*, which concerned the constitutionality of mandating the posting of the Ten Commandments in the coercive context of public classrooms with schoolchildren subject to compulsory attendance. Both circuits read *Stone* as "compell[ing]" a rejection of the State's proffered secular purposes, *Adland*, 307 F.3d, at 481; *see also Books*, 235 F.3d, at 302-04.

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6. To be sure, the fact that *Anderson* was decided before *Stone v. Graham*, 449 U.S. 39 (1980), has provided a basis for a Tenth Circuit panel, in a footnote dictum, to question its reasoning. *See Summum v. Callaghan*, 130 F.3d 906, 913 n.8 (CA10 1997). But *Summum* did not overrule *Anderson*, *id.*, and neither did *Stone* (indeed, the *Stone* majority did not even mention *Anderson*, despite the dissent's reliance on the case, *see* 449 U.S. at 196 (Rehnquist, J., dissenting)). And *Anderson* was in a far different context—not in a potentially coercive schoolroom setting—than *Stone*, as the *Colorado* court compellingly reasoned. 898 P.2d, at 1022-23.

In the past year this conflict has widened, with the Third Circuit concluding that "*Stone* is fairly limited to its facts." *Freethought*, 334 F.3d at 262. The Fifth Circuit also joined *Anderson* and *Colorado* in recognizing the secular purposes behind displaying the Ten Commandments, including an acknowledgment of their "extraordinary" "influence upon the civil and criminal laws of this country" and upon "ethics and the ideal of a just society." *Van Orden*, 351 F.3d at 181.

The decision below and the decisions in *Freethought*, *Anderson*, and *Colorado* fundamentally conflict with the decisions in *Books*, *Adland*, and *O'Bannon*. The Court should grant certiorari to resolve this conflict.

II. Should the Court Wish to Decide This Important Question, The Instant Case Would Provide an Appropriate Vehicle to Affirm a Government Display of the Ten Commandments as Constitutional.

In view of the pronounced and growing split among the courts of appeals on government displays of the Ten Commandments, it appears likely that the Court will choose to grant certiorari on this important issue in the near future. If that is true, then this case could be a particularly suitable vehicle for that purpose. First, it was tried on a stipulated record. Thus, the facts are clear and undisputed. Second, no jurisdictional obstacles prevent resolution of the merits. *Cf. Adland*, 307 F.3d, at 490-94 (Batchelder, J., dissenting) (arguing that there the court lacked a justiciable case or controversy because the monument had not yet been erected.). Third, the case concerns an Eagles monument, virtually identical to those struck down in other circuits.

And fourth, and most importantly, this case presents the facts and circumstances most favorable to upholding the display of the Ten Commandments. The particular context in which this monument is placed—among numerous other monuments on the

grounds of the historic and museum-like Texas Capitol—could provide the Court with the opportunity to flesh out its 24-year-old statement in *Stone* that the Decalogue could, within the proper context, be displayed in a constitutional manner. *See Stone*, 449 U.S., at 42. Indeed, based on the historical setting of the Texas monument; the lack of any evidence of religious purpose; the surrounding monuments celebrating people, events, and ideals important to the culture and diversity of Texas; and the over four decades for which the monument has stood, the Court should affirm the Texas monument's presence as entirely consistent with the Establishment Clause.

The Texas monument falls within the permissible realm envisioned by *Stone* because of the monument's context and history. It has been located on the Texas Capitol grounds for over forty years, without the filing of any prior legal complaint. *See* Pet. App., at 16. There is no evidence of any religious references during the dedication ceremony or of any clergy participating; nor does any evidence even remotely demonstrate that Texas's proffered secular purpose is a sham. *See id.*, at 10.

As part of the Capitol—a national historic landmark and museum under federal law—the Ten Commandments monument is overseen by a professional curator and her staff. *See id.*, at 13. Following the Capitol restoration project—and ten years before this suit was brought—the museum staff chose to return the monument to its original location—on the direct line between the legislative chambers, the executive office of the Governor, and the Supreme Court building—to reflect the role of the Ten Commandments in the making of law. *See id.*, at 15. This fact supports both the State's secular purpose for erecting and retaining the monument as well as the conclusion that a reasonable viewer would not see this display as a state endorsement of the Decalogue's religious message. *See id.*, at 14-15.

All of these facts of circumstances, as the lower court held, collectively render the display constitutional under this Court's precedents. *See id.*, at 17. Instead, the overall context "supports the conclusion that a reasonable observer would not see this display either as a State endorsement of the Commandments' religious message or as excluding those who would not subscribe to its religious statements." *See id.*, at 14.

The Ten Commandments undoubtedly express religious and sacred admonitions; equally undoubtedly, the Ten Commandments have served an historic and secular role as a foundational text for Western culture and legal codes. Memorializing that secular role, of course, is the very building housing the Supreme Court of the United States; Justices of this Court need only look over their left shoulders from the bench to see Moses holding the Ten Commandments and looking down upon them.

In *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including—explicitly—Moses holding the Ten Commandments on the frieze of the Court. 465 U.S., at 673-77. As Justice O'Connor explained, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*, at 693 (O'Connor, J., concurring). They are consistent with the United States Constitution, as is the Ten Commandments monument in the State of Texas.

The decision of the court below is correct. If the Court elects to grant certiorari, it should affirm the judgment of the Fifth Circuit Court of Appeals.

CONCLUSION

The State of Texas acquiesces in certiorari. The Court should grant the petition for writ of certiorari and affirm the judgment of the court of appeals.

Respectfully submitted,

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July 2004

APPENDIX

SENATE CONCURRENT RESOLUTION NO. 16

WHEREAS, The Fraternal Order of the Eagles for the past several years have placed across the country, in courthouses, classrooms and public places, parchment plaques and granite monoliths of the Ten Commandments; and ———————

WHEREAS, These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency; and ———————

WHEREAS, The Fraternal Order of the Eagles request permission to present a granite monolith to be placed on the grounds of the State Capitol of Texas; now, therefore, be it ——

RESOLVED, By the Senate of the State of Texas, the House of Representatives concurring, that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas. ———————————————

/s/
President of the Senate

/s/
Speaker of the House

I hereby certify that S. C. R. No. 16 was adopted by the Senate on February 14, 1961. ———————————

/s/
Secretary of the Senate

I hereby certify that S. C. R. No. 16 was adopted by the House on February 22, 1961.

/s/
Chief Clerk of the House

Approved:

March 10, 1961

/s/
Governor

5:15 p.m.

/s/

Supreme Court, U.S.
FILED
JUL 6 - 2004
OFFICE OF THE CLERK

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE THE STATES OF INDIANA, ALABAMA, DELAWARE, FLORIDA KANSAS, NORTH DAKOTA, SOUTH CAROLINA, UTAH AND VIRGINIA IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF THE AMICI STATES

The amici states support the decision below upholding the constitutionality of Texas' Ten Commandments display. Nonetheless, we join Texas in urging the Court to grant the petition so as to provide guidance to state and local governments concerning current and future Ten Commandments displays.

All across the country, government buildings and grounds feature displays of the Ten Commandments. Not all displays have the same history or context. Some have been around for decades, others are relatively new. But nearly all should be defensible under the Establishment Clause as tributes to a seminal part of our Nation's history and civilization. Such is the monument at issue in this case: It sits in a park-like setting amidst other monuments reflecting the history and culture of Texas and the Nation.

In addition to Texas, some states, such as Alabama, Colorado, Indiana and Kentucky, themselves have litigated whether their current or proposed Ten Commandments monuments are permissible. Other states that do not now have Ten Commandments displays on state property may wish to have them, or they may be interested in preserving displays on local government property. Unfortunately, the lower courts (including the courts of appeals) are increasingly divided over whether and when Ten Commandments displays are permissible. Amici thus have an interest in this case because they currently have no reliable way of knowing whether current or futur Ten Commandments displays will pass Establishment Clause muster.

REASONS FOR GRANTING THE PETITION

Many government entities have been displaying the Ten Commandments for at least several decades, and recently several others have proposed or established new monuments. Unfortunately, both the old displays and a few new ones have in recent years become the subject of a litigation blitz. As a consequence, public debate over the displays has intensified dramatically. Many communities are currently involved in litigation over whether their displays are constitutional, and many more such cases are expected. All the while, a newly refreshed circuit conflict over these displays underscores the unworkability of Establishment Clause doctrine in this area. The Court should grant the petition, but ultimately affirm the decision below, to give much needed guidance to the Nation.

I. Government Ten Commandments Displays Are Numerous, And The Debate Over Their Constitutionality Demands Resolution

1. The debate over government Ten Commandments displays is currently one of a handful of issues that deeply engages the American public. Indeed, an article in MSN's Slate Magazine dubbed the summer of 2003 the "Summer of Decalogues." *See Summer of Decalogues: When is a Ten Commandments Display Unconstitutional?*, MSN's Slate, July 25, 2003, *at* http://slate.msn.com/ID/2086046.

Yet, Ten Commandments litigation is not just a breezy summer pastime; it represents an ongoing and metastasizing philosophical battle, which, far from peaking last summer, may turn this into the "decade of Decalogues." Ten Commandments cases seem to occupy the federal courts with increasing frequency, leaving governments that wish to display the Commandments struggling to address or avoid lawsuits. As Indiana first catalogued in its petition for a writ

of certiorari in *O'Bannon v. Indiana Civil Liberties Union* No. 01-966, *cert. denied*, 534 U.S. 1162 (2002), many pending Ten Commandments cases would benefit from the Court's guidance:

Cases on appeal:

ACLU v. Harlan County, 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed,* (U.S. June 21, 2004) (No. 03-1698); *ACLU v. McCreary County,* 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed,* (U.S. June 21, 2004) (No. 03-1693); *ACLU v. Pulaski County,* 354 F.3d 438 (6th Cir. 2003), *petition for cert. filed,* (U.S. June 21, 2004) (No. 03-1693); *Society of Separationists v. Pleasant Grove*, No. 2:03-CV-839 (D. Utah May 28, 2004) (order granting judgment on pleadings), *available at* http://www.utd.uscourts.gov/reports/00000034.pdf, *appeal docketed,* No. 04-4136 (10th Cir. June 21, 2004); *Baker v. Adams County*, 2004 WL68523 (6th Cir. 2004), *petition for cert. filed sub nom. Johnson v. Baker*, (U.S. June 14, 2004) (No. 03-1661); *ACLU v. Mercer County,* No. 01-CV-480 (E.D. Ky. Jan. 22, 2003) (order granting summary judgment), *appeal pending,* No. 03-5142, (6th Cir. argued April 27, 2004); *Books v. Elkhart County*, No. 3:03-CV-233 (N.D. Ind. Mar. 19, 2004) (order granting motion for summary judgment), *appeal docketed,* No. 04-2075 (7th Cir. April 26, 2004); *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) (opinion vacated April 6, 2004, pending rehearing *en banc*); *Modrovich v. Allegheny County*, No. 2:01-CV-531 (W.D. Pa. July 28, 2003) (order granting summary judgment), *appeal pending*, No. 03-3571 (3d Cir. argued March 24, 2004); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004), *appeal docketed*, Nos. 04-1321, et al. (7th Cir. Feb. 9, 2004); *ACLU of Ohio v. Ashbrook, et al.*, 211 F. Supp. 2d 873 (N.D. Ohio 2002), No. 02-3667 (6th Cir. argued Oct. 31, 2003).

Cases in district court:

ACLU v. Monroe County, No. 3:04-CV-00048 (E.D. Tenn. filed January 28, 2004); *Doe v. Barrow County*, No. 03-CV-156 (N.D. Ga. filed September 16, 2003); *Card v. City of Everett*, No. 2:03-CV-02385 (W.D. Wash. filed July 23, 2003); *Chambers v. City of Frederick*, No. 1:03-CV-01865 (D. Md. filed June 24, 2003); *Twombly v. Fargo*, No. 02-CV-137 (D. N.D. filed Nov. 27, 2002); *ACLU v. Garrard County*, No. 01-CV-481 (E.D. Ky. filed Nov. 27, 2001); *ACLU v. Grayson County,* No. 01-CV-202 (W.D. Ky. filed Nov. 27, 2001); *ACLU v. Rowan County,* No. 01-CV-220 (E.D. Ky. filed Nov. 27, 2001).

In addition, several more governments are attempting to negotiate compromises in order to avoid threatened lawsuits. *See* Julie Sheldon, *Group Helping to Keep Memorial*, Evening Sun (Hanover, PA), June 10, 2004, at A3; Alan Choate, *Group Wants 'Cornerstone of Law' Proposal Put Into Writing*, The Daily Inter Lake (Kalispell, MT), June 8, 2004, *available at* http://www.dailyinterlake.com/NewsEngine/SelectStory_AD.tpl?command=search&db=News.db&eqskudata=88-808567-18; Brendan Burke, *Ten Commandments Plaza Delayed a Year*, Casper Star-Tribune (Wyoming), June 8, 2004, *available at* http://www.casperstartribune.net/articles/2004/06/08/news/casper/2615dcd22ee4731c87256ead00053429.txt. The frequency of Ten Commandments-related Establishment Clause lawsuits (and threatened lawsuits) is thus already very high.

2. Nor is this issue likely to fade. Not only do hundreds of government Ten Commandments displays already exist across the country (*see Books v. City of Elkhart*, 235 F.3d 292, 294-95 (7th Cir. 2000)), but there is also a resurgent popular (and hence government) interest in Ten Commandments displays. At least five states have enacted legislation authorizing displays of the Ten Commandments

in historical contexts on public grounds or in public schools. *See* Ind. Code §§ 4-20.5-21-2 and 36-1-16-2; Ky. Rev. Stat. § 158.195; N.M. Stat. §§ 22-15-15 to 22-15-20; N.C. Gen. Stat. § 115C-81(g)(3b); and S.D. Codified Laws § 13-24-17.1. Furthermore, in the past year, legislatures in Alabama, Florida, Georgia, Idaho, Maryland, Mississippi, Ohio, Oklahoma, South Carolina, Tennessee and Virginia all reportedly considered taking steps to support, permit or require government or public school displays of the Ten Commandments. *See* Americans United for Separation of Church and State: All 50 States (tracking current state legislation), *at* http://www.au.org/site/PageServer?pagename=advocacy_states (last visited June 18, 2004).

Congress has also put promoting the Ten Commandments on its agenda. In 1997, the House of Representatives passed a Resolution expressing its sense that "(1) the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society; and (2) the public display, including display in government offices and courthouses, of the Ten Commandments should be permitted." H.R. Con. Res. 31, 105th Cong. (1997). In 1999, the House (but not the Senate) passed the Ten Commandments Defense Act, which would have approved posting the Ten Commandments on state and local government property. H.R. 1501, 106th Cong. § 1202 (1999). Congress has continued to pursue this issue. *See* H.R. 3895, 107th Cong. (2002) and H.R. 2045, 108th Cong. (2003).

These legislative endeavors highlight the importance of government Ten Commandments displays to the American public. It follows that granting certiorari to resolve the constitutionality of such displays is also of great public interest.

II. The Circuits Are In Conflict Over Government Ten Commandments Displays, And The Applicable Doctrine Is In Disarray

1. Government Ten Commandments displays have been upheld not only in the decision below, but also in the Third and Tenth Circuits, as well as in the Colorado Supreme Court.[1] Such displays have been held unconstitutional in the Sixth, Seventh, and Eleventh Circuits.[2] An Eighth Circuit panel decision also found a Ten Commandments display unconstitutional; however, that decision was vacated pending *en banc* rehearing. *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) (opinion vacated, April 6, 2004, pending rehearing *en banc*).

Notwithstanding this conflict, in recent years this Court has declined to hear several cases in which a local or state government's Ten Commandments display was adjudged to violate the Establishment Clause. *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied,* 538 U.S. 999 (2003); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 124 S.Ct. 497 (2003); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied,* 534

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[1] *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973); *State of Colorado v. Freedom From Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995); *see also Suhre v. Haywood County*, 55 F. Supp. 2d 384, 399 (W.D. N.C. 1999) (upholding a courtroom display that included the Ten Commandments).

[2] *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.2d 766 (7th Cir. 2001); *Glassroth v. Moore*, 355 F.3d 1282 (11th Cir. 2003).

U.S. 1162 (2002); *Books v. City of Elkhart*, 235 F. 3d 292 (7th Cir. 2000), *cert. denied,* 532 U.S. 1058 (2001). But while each of those displays came to the court having been enjoined below, here the Fifth Circuit *upheld* a display. This holding demonstrates that the circuit conflict concerning such displays is vital, fresh and deep.

2. Fueling this conflict, as well as the raging public debate over the Ten Commandments, is confusing and oft-criticized Establishment Clause doctrine. In Indiana's Ten Commandments case a few years ago, the district court remarked that sorting through the merits was "no small assignment, given the profusion and confusion reflected in the case law and in Supreme Court precedent." *Indiana Civil Liberties Union v. O'Bannon*, 110 F.Supp. 2d. 842, 848 (S.D. Ind. 2000).

Lemon v. Kurtzman, 403 U.S. 602 (1971), is the seminal decision for Establishment Clause cases, but this Court itself has sometimes eschewed *Lemon* in favor of more subjective, if doctrinally less rigorous, analyses, with seemingly conflicting results. *Compare Marsh v. Chambers*, 463 U.S. 783, 786-792 (1983) (upholding the common practice of legislative prayer based on "common sense" that government was not promoting religion) *with Lee v. Weisman,* 505 U.S. 577, 586-87 (1992) (invalidating commonplace public school graduation prayers because government was so obviously sponsoring religious practice). More recently, the majority opinion in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), did not even mention *Lemon*.

It should therefore not be surprising that lower courts frequently struggle just to determine what precedent to apply. At least one court wondered whether Ten Commandments displays discriminate among religions and thus trigger the "strict scrutiny" standard from *Larson v. Valente*, 456 U.S. 228 (1982). *See ACLU Nebraska Found. v. City of Plattsmouth,* 358 F.3d 1020, 1032-34 (8th Cir. 2004)

(opinion vacated, April 6, 2004, pending rehearing *en banc*); *see also Glassroth v. Moore*, 335 F.3d 1282, 1299 n. 3 (11th Cir. 2003). Others have decided Ten Commandments issues using the Court's reasoning in both *Lemon* and *Marsh*. *See ACLU Nebraska*, 358 F.3d at 1034, 1042; *Glassroth*, 335 F.3d at 1295, 1297-98; *see also Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 779 (7th Cir. 2001) (Coffey, J., dissenting) (citing *Marsh* for the proposition that, "[w]here a religious symbol has a landmark foundation and meaning in the history of our country," the government may display a symbol regardless of analysis under *Lemon*).

This uncertainty surrounding *Lemon*'s meaning and vitality has been exacerbated by the endorsement test from *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring), and *Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989). *Adland*, for example, explained esoterically that the Sixth Circuit has used the endorsement test as "a refinement or modification of the first and second prongs [of *Lemon*], a clarification of the first prong [of *Lemon*], . . . as a modification of the entire *Lemon* test," and "as a refinement of the second *Lemon* prong." *Adland,* 307 F.3d at 479 (internal citations omitted).

It was therefore a dramatic understatement for the Third Circuit to observe in a Ten Commandments display case that Establishment Clause doctrine "is somewhat murky . . . ." *Freethought Society v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003). In fact, expressing dissatisfaction with *Lemon* and its progeny has become de rigueur in Establishment Clause opinions. *See Glassroth*, 335 F.3d at 1295 ("We follow in the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned.").

The Court last directly addressed the circumstances in which government may display the Ten Commandments in

Stone v. Graham, 449 U.S. 39 (1980). *Stone* invalidated particular types of Ten Commandments displays in public school classrooms, but its rationale applies only in that narrow context. *Id.* at 42. *Lynch* and *Allegheny* address government displays of other religious objects to the general public, but those cases are of limited use because they address temporary displays concerning religious celebrations, not permanent displays related to history and culture. Only by reviewing a general public Ten Commandments display case can the Court provide the necessary guidance.

This case bears all the hallmarks of being worthy of review: The doctrine is jumbled, the litigation is growing, the public is engaged, and the Fifth Circuit has just freshened the conflict. It is time to resolve the Ten Commandments issue.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should affirm the decision below.

Respectfully submitted,

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Dated: July 6, 2004

(35)

No. 03-1500

DEC 13 2004

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 31, 2004
Certiorari Granted October 12, 2004

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U.S. District Court

Western District of Texas (Austin)

CIVIL DOCKET FOR CASE #: 01-CV-833

DATE	#	DOCKET ENTRY
12/6/01	–	Case assigned to Honorable Harry L. Hudspeth (mc2) [Entry date 12/06/01]
12/6/01	1	Motion by Thomas Van Orden to proceed in forma pauperis (mc2) [Entry date 12/6/01]
12/6/01	–	Received, Complaint. (mc2) [Entry date 12/06/01]
		* * *
1/8/02	6	Order granting motion to proceed in forma pauperis [1-1]. (Noticed 1/8/02.) (mc2) [Entry date 01/08/02]
		* * *
1/8/02	8	Complaint filed. Filing Fee: IFP (Pages: 8) (mc2) [Entry date 01/08/02]
		* * *
2/4/02	16	Amended complaint by Thomas Van Orden, amending complaint [8-1] to change the capacity designation of all defendants (Pages: 5) (trh) [Entry date 02/04/02]
		* * *

4/22/02	23	Notice of filing by Thomas Van Orden of his "Proffered Second Amended Complaint"; (Second Amended Complaint rec'd) (trh) [Entry date 04/22/02]
4/22/02	24	Order granting motion to add defendants [21-1]; Ordered that Plaintiff's Second Amended complaint be filed. (trh) [Entry date 04/23/02]
4/22/02	25	Second Amended complaint by Thomas Van Orden incorporating new Defendants Bill Ratliff and James E. "Pete" Laney [8-1] (Pages: 6) (trh) [Entry date 04/23/02]
5/7/02	26	Answer by Rich Perry, Bill Ratliff, James E. "Pete" Laney, David Cain, Tony Goolsby, Rick Crawford to second amended complaint (mc2) [Entry date 05/08/02]

* * *

7/29/02	–	Bench trial begun, parties announce ready, opening statements of counsel heard, testimony heard on behalf of Pla and Dfts; witnesses sworn, evidence submitted on behalf of Pla and Dfts; stipuations filed; supplemental brief from Pla due 8/9/02, response by Dft due 8/16/02. (trh) [Entry date 07/30/02]
7/29/02	48	Witness for Pla and Dft: Thomas Van Orden, Rick Crawford (trh) [Entry date 07/30/02]
7/29/02	49	Joint Exhibit list by Pla Thomas Van Orden and Dfts Rick Perry, et al. (trh) [Entry date 07/30/02]

* * *

8/7/02	50	Transcript filed for dates of 7/29/02 (Proceedings Transcribed; Non Jury Trial) (court Reporter; Logan Miller) (trh) [Entry date 08/08/02]

* * *

10/2/02	67	Order that the Plaintiff's request for injunctive and declaratory relief in the above-styled and numbered cause be denied; that judgment be in favor of the Defendants and that Plaintiff take nothing by his suit (gr) [Entry date 10/03/02]
10/2/02	68	Judgment for Rick Perry, Bill Ratliff, James E. "Pete" Laney, David Cain, Tony Goolsby, Jocelyn Levi Straus, Rick Crawford against Thomas Van Orden (Pages: 2); that Plaintiff, Thomas Van Orden take nothing by his suit (gr) [Entry date 10/03/02]
10/2/02	–	Case closed (gr) [Entry date 10/03/02]
10/28/02	69	Notice of appeal by Thomas Van Orden (sl) [Entry date 10/29/02]
10/29/02	–	Notice of appeal and certified copy of docket to USCA: appeal [69-1] (sl) [Entry date 10/29/02]
10/29/02	–	Served copy of notice of appeal, dkt #69, on Thomas Van Orden, Michael Winget-Hernandez, Kelly Shackelford, David Lill, Mathew Staver, Kathleen Goodman, and Court. (sl) [Entry date 10/29/02]

* * *

11/18/02 – Certified and transmitted record on appeal to U.S. Court of Appeals: appeal [69-1] #02-51184 (sl) [Entry date 11/18/02]

* * *

1/15/04 71 Certified copy of judgment of USCA affirming the district court appeal [69-1] #02-51184 USCA filed 11/12/04. Issued as Mandate 1/13/04, USDC filed, dkt'd, imaged and mailed 1/15/04. (sl) [Entry date 1/15/04]

1/20/04 – Record on appeal returned from U.S. Court of Appeal: appeal [69-1] #02-51184 (sl) [Entry date 01/20/04]

* * *

US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 02-51184
Nsuit: 3440 civil Rights: Other
Van Orden v. Perry, et al
Appeal from: Western District of Texas, Austin

10/31/02 Civil rights case docketed. NOA filed by Appellant Thomas Van Orden. [02-51184] (rjd)

* * *

11/20/802 Record on appeal filed. Vol(s) of Pleadings; 2 Vol(s) of Transcripts: 1 Exhibits: 1 box. [02-51184] ROA ddl

* * *

9/2/03 Oral argument heard. Case argued by Thomas Van Orden for Appellant Thomas Van Orden, R Ted Cruz for Appellee Charlynn Doering, Appellee Jocelyn Levi Straus, Appellee Peggy Hamrick, Appellee Chris Harris, Appellee Tom Craddick, Appellee David Dewhurst, Appellee Rick Perry [02-51184] (src)

11/12/03 Opinion filed. Issd in T form? y Mandate pull date is 12/3/03. [02-51184] (jma)

11/12/03 Judgment entered and filed. [02-51184] (jma)

11/25/03 Petition for Rehearing En Banc received from Appellant Thomas Van Orden. Sufficient [Y/n]: Y. [02-51184] Mandate pull date canceled. Submit EB or Pet for Rehearing due on 12/10/03. (vds)

11/25/03 Petition filed by Appellant Thomas Van Orden for rehearing en banc. # of copies filed; 20 [4696781-1] Submit EB or Pet for Rehearing due ddl satisfied. Date or COS: 11/20/03 Sufficient [Y/N]: Y 02-51184] (lmc)

1/5/04 COURT Order filed denying petition for rehearing en banc [4696781-1] With poll (Y/N)?: N. Mandate pull date is 1/12/04. copies to all counsel. [02-51184] (mcs)

1/13/04 Mandate issued. Approved BOC Issued (Y/N)?: n [02-51184] Mandate pull date satisfied. (jca)

* * *

5/10/04 Supreme Court notice that petition for certiorari was filed on 03/31/04 by Appellant Thomas Van Orden. Supct No.: 03-1500 [02-51184] (cav)

10/28/04 Supreme Court order received denying petition certiorari [4829538-1] by Appellant Thomas Van Orden on 10/12/04. [02-51184] (cav)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THOMAS VAN ORDEN

Plaintiff

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board

BILL RATLIFF, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas

JAMES E. "PETE" LANEY, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives Of Texas

DAVID CAIN, in his official capacity as Member of the State Preservation Board

TONY GOOLSBY, in his official capacity as Member of the State Preservation Board

JOCELYN LEVI STRAUS, in her official capacity as Member of the Texas Preservation Board

RICK CRAWFORD, in his official capacity as Executive Director, State Preservation Board

Defendants

CIVIL ACTION NO. A 01CA 833H

SECOND AMENDED COMPLAINT

(Filed April 22, 2002)

1. The action arises under the First and Fourteenth Amendments to the Constitution of the United States as hereinafter more fully appears. 28 U.S.C.A. Sec. 1331.

2. Plaintiff brings this action against defendants to redress the deprivation of rights secured him by the First and Fourteenth Amendments to the Constitution of the United States. 42 U.S.C.A. 1983. The Court has jurisdiction pursuant to 28 U.S.C.A. Secs. 1331, 1343 and 42 U.S.C.A. 1983.

3. Venue in the Western District of Texas, Austin Division, is proper pursuant to 28 U.S.C.A. Sec. 1391(b)(1) and (2).

4. Plaintiff is Thomas Van Orden, a citizen of the United States and a resident of Austin, Travis County, Texas whose address is P. O. Box 2509, Austin, Texas 78768.

5. Defendants are:

   (a) Rick Perry, in his official capacity as Governor of Texas and Chairman, State Preservation Board. He is a resident of Austin, Travis County, Texas whose office address is Room CAP 2S.1, Austin, Texas 78701 [sic];

   (b) Bill Ratliff, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas. He is a resident of Texas whose office address is Room CAP 3S.5, Austin, Texas 87801 [sic].

   (c) James E "Pete" Laney, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas. He is a resident of Texas whose office address is Room CAP 2W.13, Austin, Texas 78701;

   (d) David Cain, in his official capacity as member of the State Preservation Board. He is a resident of Texas whose office address is Room CAP 3E.16, Austin, Texas 78701;

   (e) Tony Goolsby, in his official capacity as member of the State Preservation Board. He is a resident of Texas whose office address is Room CAP 1W.6, Austin, Texas 78701;

   (f) Jocelyn Levi Straus, in her official capacity as member of the State Preservation Board. She is a resident of Texas;

   (g) Rick Crawford, in his official capacity as Executive Director of the State Preservation Board. He is a resident of Texas whose office address is Sam Houston Building, 201 E. 14th, Suite 950, Austin, Texas 78711.

6. In 1961, the State of Texas, by a joint resolution of the Texas Senate and Texas House of Representatives, accepted from The Fraternal Order of the Eagles of the State of Texas, a private organization, a granite monument inscribed with the Ten Commandments for placement on the grounds of the State Capitol of Texas.

7. Thereafter, in 1961, the State of Texas placed or caused or permitted the Ten Commandments monument to be placed on the grounds of the State Capitol of Texas where it remains today.

8. The State Preservation Board, an agency of the State of Texas, was created by an Act of the Legislature in 1983. V.T.C.A., Government Code, Sec. 443.001 et seq. The Board is vested with and exercises broad authority over the Capitol Grounds including the continuing

display and maintenance of the Ten Commandments monument.

9. The State Preservation Board consists of the following members:

   (a) Rick Perry, Governor of Texas, serves as Chairman of the Board;

   (b) Bill Ratliff, Lt. Governor of Texas, serves as Co-Vice Chairman of the Board;

   (c) James E. "Pete" Laney, Speaker of the House of Representatives of Texas, Serves as Co-Vice Chairman of the Board;

   (d) David Cain, Texas State Senator, serves as a Member of the Board;

   (e) Tony Goolsby, Member, House of Representatives of Texas, serves as a Member of the Board;

   (f) Jocelyn Levi Straus serves as the citizen Member of the Board;

   (g) Rick Crawford serves as Executive Director of the State Preservation Board.

10. The Defendants, acting under color of law, set Board policy and supervise Board staff and employees in providing for the continuing display and maintenance of the Ten Commandments monument.

11. Plaintiff is a resident of Austin, Texas. He is not religious. He does not subscribe to Ten Commandments monument's inscribed assertion that God exists. He does not subscribe to the implication the Ten Commandments are God's law and he does not subscribed [sic] to the precepts engraved on the monument.

12. Plaintiff regards the Ten Commandments monument, as and where displayed, as an endorsement by the State of Texas of religion and of Christianity and Judaism in particular.

13. The Ten Commandments monument conveys the message to Plaintiff that politically, there are ins and outs based on religious belief – that those who do not embrace religion are second-class citizens and set apart. He regards the monument as a spiritual affront.

14. The Capitol Grounds, including the area of the Ten Commandments monument, are open to the public. Plaintiff, in his normal routine, comes into frequent unwelcome, direct and personal contact with the Ten Commandments monument.

15. The State Capitol Building and Capitol Grounds are the seat of state government and the focal point of political rallies, protests, celebrations and community events. Plaintiff often attends these events and in so doing comes into unwelcome, direct and personal contact with the Ten Commandments monument.

16. The Ten Commandments monument is located in close proximity to the Capitol Building and Capitol Extension which house the State Legislature, Governor's Office, offices of State Legislators and legislative hearing rooms. Also in close proximity are the Supreme Court and Court of Criminal Appeals of Texas, the Attorney General and State Law Library.

17. Plaintiff's attendance at any of these locations necessitates that he come into unwelcome, direct and personal contact with the Ten Commandments monument. The monument can only be avoided if Plaintiff assumes the burden of entering and exiting the Capitol Grounds and buildings in ways other than the

most direct, advantageous and natural and by avoiding the area of the monument altogether.

18. The actions set forth in paragraphs 6, 7, 8 and 10 constitute state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

19. Continuing display of the Ten Commandments monument will cause Plaintiff irreparable injury for which no adequate remedy at law exists by depriving him of his rights guaranteed under the Establishment Clause of the First Amendment to the United States Constitution.

PRAYER

WHEREFORE Plaintiff prays that this court:

1. Assume jurisdiction of this action;

2. Declare that, as displayed, the Ten Commandments monument constitutes a continuing violation of the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. 28 U.S.C.A., Secs 2201, 2202;

3. Issue a mandatory injunction requiring the removal of the Ten Commandments monument from display on the Capitol Grounds or upon such other terms as the Court finds fully remedies the continuing constitutional violation;

3. Such other and further relief as the Court finds necessary and proper.

RESPECTFULLY SUBMITTED,

Thomas Van Orden
THOMAS VAN ORDEN
Plaintiff, pro se
P.O. Box 2509, Austin, Texas 78768
seneca50@hotmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THOMAS VANORDEN, *Plaintiff,* v. RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; BILL RATLIFF, in his official capacity as Co-Vice Chairman, State Preservation Board; JAMES E. "PETE" LANEY, in his official capacity as Co-Vice Chairman, State Preservation Board; DAVID CAIN, in his official capacity as Member of the State Preservation Board; TONY GOOLSBY in his official capacity as Member of the State Preservation Board; JOCELYN LEVI STRAUS in her official capacity as Member of the State Preservation Board; RICK CRAWFORD in his official capacity as Executive Director, State Preservation Board, *Defendants.*	§	Civil Action No. A 01 CA 833 H

DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

(Filed May 7, 2002)

TO THE HONORABLE HARRY LEE HUDSPETH, UNITED STATES DISTRICT JUDGE:

Defendants, RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; BILL RATLIFF, in his official capacities as President of the Senate, and Co-Vice Chairman, State Preservation Board; JAMES E. "PETE" LANEY, in his official capacities as Speaker of the House of Representatives and as Co-Vice Chairman, State Preservation Board; DAVID CAIN, in his official capacity as Member of the State Preservation Board; TONY GOOLSBY in his official capacity as Member of the State Preservation Board; RICK CRAWFORD in his official capacity as Executive Director, State Preservation Board, file this Answer to Plaintiffs Amended Complaint, and would respectfully show the Court as follows:

1 Defendants acknowledge Plaintiffs characterizations of the nature and legal bases of his claims in Paragraphs 1 and 2 of the Amended Complaint, without waiving the right to contest their validity.

2. Defendants acknowledge and agree that venue in this court is proper, as asserted in Paragraph 3.

3. Without waiving their right to object to legal defects in the naming, status, capacity, standing, or other issue touching upon the parties themselves, the accuracy of Plaintiff's identification of the parties in Paragraphs 4 and 5 is not disputed.

4. The averments of Paragraph 6 are admitted.

5. The averments of Paragraph 7 are admitted.

6. The averments of Paragraph 8 are admitted.

7. The averments of Paragraph 9 are admitted.

8. The averments of Paragraph 10 are admitted.

9. Defendants can neither admit nor deny the averments of Paragraph 11.

10. Defendants can neither admit nor deny the averments of Paragraph 12.

11. Defendants deny the first sentence of Paragraph 13, but can neither admit nor deny the averment of the second sentence.

12. Defendants admit the first sentence of Paragraph 14, but can neither admit nor deny the averments of the second sentence.

13. Defendants admit the first sentence of Paragraph 15, but can neither admit nor deny the averments of the second sentence.

14. Defendants admit the averments of Paragraph 16.

15. Defendants can neither admit nor deny the averments of Paragraph 17.

16. Defendants contend that the legal conclusions reached in Paragraph 18 are in dispute.

17. Defendants deny the averments of Paragraph 19.

18. Defendants contend that Plaintiff is neither legally nor justly entitled to the relief he seeks.

19. Defendants pray that Plaintiff take nothing and that all court costs be taxed against him, and for such other and further relief as to which they may show themselves justly entitled.

Respectfully submitted,

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United States District Court
Western District Of Texas

[Caption Omitted In Printing]

Trial Transcript of Rick Crawford

VAN ORDEN VS. PERRY, ET AL

Condenselt™

BENCH TRIAL

[52] MR. VAN ORDEN: No, sir, I do not. The plaintiff rests at this time.

THE COURT: The defense?

MR. WINGET-HERNANDEZ: We call Rick Crawford to the stand, Your Honor.

THE COURT: Come on up and take the oath, please.

(Witness sworn.)

DIRECT EXAMINATION

MR. WINGET-HERNANDEZ: May we give him the exhibits, Your Honor?

THE COURT: Sure.

(BY MR. WINGET-HERNANDEZ)

Q Good morning, Mr. Crawford. Will you please state your name for the record.

A Yes, sir. Good morning. My name is Rick Crawford.

Q And tell us who you are and what you do.

A I am the executive director of the State Preservation Board. The state preservation board is a board whose members are the governor, the lieutenant governor, the speaker, the chairman of Senate administration, the chairman of House administration and a public member selected by the governor.

Q And do you appear here today on behalf of the other defendants, which include the governor and the lieutenant governor in their capacities – in those capacities as well as in their representative capacities as members of the State [53] Preservation Board?

A I do.

Q Will you tell us briefly what is your educational background and professional – or at least your public service that brought you to this position.

A I have a BBA from the University of Texas from 1976. After that I was engaged in the commercial real estate business for some 15 years or so. In 1988 I ran for the Texas House of Representatives and was elected. I began my service in the House in January of 1989 and served for four years.

Q And subsequent to that did you serve in a public capacity?

A After I left the legislature, I went to work for Speaker Laney. I worked for him for two and a half years. One of the duties assigned to me under his employment was to look after the State Preservation Board or, you know, watch what they were doing during the capitol restoration project. And once the capitol restoration project was completed and my predecessor, Ms. Dealy

Herndon, left state employment, I was selected to take this position.

Q And describe the position for us exactly in terms of its duties.

A The state preservation board overseas the maintenance functions of the state capitol building. Technically, the [54] agency owns the capitol. Its mission was to restore and maintain in restored state the capitol building, all its grounds, its contents. The state preservation board also developed, designed, constructed and now operates the Bob Bullock Texas State History Museum. So we have that function of running the museum and taking care of the capitol building.

Q Describe for us the curatorial function of the state board of preservation and the professional staff that you employ for that purpose.

A We have a highly professional staff in a lot of areas, but particularly in our curatorial department, which employs three professional people and a support person. And, of course, the rest of the agency is there to support them as well.

THE COURT: You said curatorial?

THE WITNESS: Yes, sir.

THE COURT: Is that a word?

THE WITNESS: I hope so. We have a curator of the capitol.

THE COURT: I have heard of curator. I just haven't heard of curatorial.

THE WITNESS: she's convinced me that's a word, Your Honor.

THE COURT: We will accept that for purposes of this [55] case.

THE WITNESS: We do have three people in that department, and their function is to maintain the historic artifacts of the capitol collection. There are several pieces of art that are display [sic] in the capitol that has a tremendous value. My guess would be in the range of 20 million to 30 million dollars worth of art that our curatorial department takes care of.

There are also several pieces of furniture that were original to the capitol in 1888. And the curatorial department takes care of those furnishings. There are some replication furnishings that were replicated during the capitol restoration project. And the curatorial department takes care of those as well.

Part of the functions of that department is to take care of the – to help oversee the maintenance of the monuments, which we do in a combination of outsource contracts in house, people who actually take care of the monuments.

(BY MR. WINGET-HERNANDEZ)

Q Does the state board of preservation also offer educational programs to the general public and to visitors to the capitol specifically?

A Yes. One of the functions of our department is to offer educational programs and brochures. In addition to the [56] capitol and the museum that I mentioned, there's also the 1856 to '57 old General Land Office building on

the south capitol grounds. Our agency operates that facility as well.

There are educational programs associated with that facility, two films that talk about – one that speaks of the history of the land trade for the capitol building, and the other that speaks about a dome tour. For people who can no longer go to the dome, they can at least take this tour via video.

And there are also other educational aspects to that. Our tour guides, which we operate in the capitol, give tours all during the day. And part of their job is to educate the public during the day. And part of their job is to educate the public during these tours as to the history of the building.

Q Is it fair to say, sir, that the maintenance and – I'll use the word again, the curatorial aspects as well as the publicity aspects of your agency are essential to the mission of the state preservation board?

A Yes, sir.

Q And is it fair also to say that the preservation board accomplishes all of its ad ministerial or all of its duties with respect to the capitol and its grounds essentially for the purposes of esthetically maintaining them and educating the public about them?

A That's true.

Q Just so I'm sure your testimony is clear, does the state [57] preservation board then exhibit tangible objects to the public on a regular basis?

A Certainly the art that I mentioned and some of the furnishings as well.

Q The United States Code in Title 20, which is education, Chapter 72, museum and library services, defines a museum as a public or private nonprofit agency or institution organized on a permanent basis for essentially education or esthetic purposes that utilizes a professional staff, owns or utilizes tangible objects, cares for the tangible objects and exhibits the tangible objects to the public on a regular basis.

Does the state preservation board fit that definition?

A Would you read it again?

Q Certainly. "The term museum means a public or private nonprofit agency or institution organized on a permanent basis for essentially educational or esthetic purposes that utilizes a professional staff, owns or utilizes tangible objects, cares for tangibles objects and exhibits the tangible objects to the public on a regular basis."

A I think the state preservation board does all those things. And the capitol itself has many museum features as well.

Q Isn't it – is it your position and the position of the defendants that the capitol grounds are an extension of the living museum that is the capitol?

[58] A Yes, sir, I believe so.

Q And with respect to your essentially educational and esthetic functions, hasn't the state preservation board as a function of the law that created it assumed many of the educational functions of numerous other agencies?

A Yes. The enabling legislation that established the state preservation board – prior to the establishment of the state preservation board, several agencies had some role in the management of the capitol building: The Commission On the Arts, the General Services Commission, the Library and Archives Commission. I believe TXDOT had a presence there as well. All these agencies or those named in our enabling legislation, whatever powers and duties they had with respect to the capitol were transferred to the state preservation board.

Q This includes the Texas Historic Commission and the state archives program?

A Yes, sir.

Q Does it also include the Texas Commission on the Arts?

A Yes, sir.

Q And all the duties previously performed by all those state agencies with respect to the capitol and its grounds are now performed by your agency; isn't that right?

A That's correct.

Q The state, through the state preservation board, has [59] taken a variety of actions which reinforce the historic nature and the civic, the cultural and the secular nature of the monuments that appear o [sic] the state grounds, the capitol grounds; isn't that right?

A Yes, sir, I believe so.

Q And do those include application for national landmark status?

A Yes, sir.

Q Were you actually the executive director at the time that the capitol and its grounds received that status?

A I believe that the capitol was selected as a national landmark before my tenure at the preservation board. I believe that would have been under Ms. Herndon. And it could have been before her tenure.

Q So we are clear on your relationship to the activities of the state preservation board during that time, from what period were you working for the speaker on reviewing the state preservation board's activities with respect to the capitol extension?

A From mid January of 1993 until I took this position September 22nd of 1995.

Q All right. If you'll look at Exhibit 3, please. Isn't Exhibit Number 3 – doesn't that reflect the document showing the application and the acceptance by the Department of the Interior of the capitol and its grounds as a national [60] historic landmark?

A What I have here is a letter –

THE COURT: Mr. Crawford, I have that microphone turned up as high as it will go, but it's not going to work unless you get right straight in front of it. So don't lean over there and talk from over there.

THE WITNESS: Yes, sir. What I have here is a letter from the –

THE COURT: Which you are doing again. I don't know what you are going to do with that exhibit or

anything else, but you turn yourself around where you speak right into the microphone, please.

THE WITNESS: Yes, sir. What I have in my booklet under Tab 3 is a letter from the Department of the Interior to the mayor of Austin.

(BY MR. WINGET-HERNANDEZ)

Q And that letter is also – that letter actually covers an application by the Texas Historical Commission, does it not, to the United States Department of the Interior?

A Yes, it does.

Q And that is followed by pages from the application itself showing that the historical commission, which was the predecessor, as we have already discussed, to the state preservation board in these matters, submitted this application to the Department of the Interior, including the [61] geographical data that appear on the last page showing that the entire property, at that time 27 acres, was offered for the consideration of the Department of the Interior as a national historic landmark, correct?

A Correct.

Q And in fact, one of the indicia of its acceptance by the Department of the Interior is a plaque which we couldn't bring in with us today because it's actually affixed to the capitol itself.

A Yes, sir.

Q And have you seen that? Do you know where it is?

A Yes, sir.

Q And are you aware in your official capacity that the capitol and its grounds do as of 1986 constitute a federally protected national historic landmark?

A Yes, sir.

Q Are you also aware, sir, that that is – well, are you aware that the capitol appeared in the National Register of Historic Places as early as 1970?

A I was not aware of that.

THE COURT: What exhibit is he looking at? I missed the number.

MR. WINGET-HERNANDEZ: He's looking at Exhibit Number 3, Your Honor.

THE COURT: Three.

[62] (BY MR. WINGET-HERNANDEZ)

Q Now, you rely upon the professional expertise of the employees – of your employees essentially. You run the state preservation board; isn't that right?

A Yes, sir.

Q How many employees do you have all together?

A We have 214 employees. About 110 or so are associated with the museum, and the balance are at the capitol extension and grounds.

Q About how many of those are tour guides?

A Well, the state has a term called FTE, which is a full-time equivalent, position, and we have tour guides typically that are students and work half time or part time. So I think we have approximately 30 FTES assigned

to the tour guides, but that may translate to 60 employees or something less than that.

Q And what portion of the staff is involved – apart from the tour guides is involved in the educational aspects, if you include the state curator and her staff?

A The curator of the capitol and her staff would be four people total. Three professional positions. The tour guides would be 25 to 30 FTES, depending on the time of year. But there are other people in our agency that deal with education and help assist in educating the public as well.

We have an architectural kind of department that deals [63] with blueprints and that kind of things and informs people of the size of the buildings and – you know, the educational role is more than just those two sections.

Q The staff that you have described, can you describe for the court basically, for example, the professional qualifications of the capitol curator.

A Well, an awful lot of people who work for me have more advanced degrees than I have. And certainly the curatorial department, I believe all those people have advanced degrees that are in professional positions.

Q The curator herself has an advanced degree of museum sciences, does she not?

A I believe she does, from the University of Kansas.

Q And there are other members, professional members, of your staff that have degrees in history or degrees that reflect knowledge and understanding of the historic value of the objects that you are in the process of

esthetically maintaining and educationally presenting to the public; isn't that right?

A That's correct.

Q And you rely on that staff on a regular basis in order to help you do the official work of the state preservation board.

A Every day.

Q And before the existence of the state preservation [64] board, when you were a state legislator, you relied upon the professional advice of the Texas Historic Commission and the other agencies that were charged with the duties of preserving and maintaining and educating the public about the capitol and its ground and the monuments.

A Actually, the state preservation board was created before I came to the legislature. And I think your question presupposed that it was created afterwards.

Q That's true. So what you are suggesting to me is that you have been able to rely for your entire career as a representative of the State of Texas upon the professional advice of the professional staff of the state preservation board.

A That's true.

Q And I would ask you, in your capacity both as a representative of the State of Texas and in your legislative capacity and your capacity as the executive director of the state board of preservation, whether you have an opinion based on advice of these professional people in your employ about the historical and secular value of the Ten Commandments monument.

MR. VAN ORDEN: Your Honor, I'm going to object to that. I don't think this man is qualified to give an opinion testimony. He hasn't been qualified as an expert. They designated no experts.

[65] THE COURT: I'm a little confused about whether you are asking him for his personal opinion based on his personal knowledge and experience or based on what somebody else has told him, because you made some passing reference to his staff or these other employees. So the objection to the form of the question is sustained. Maybe you can rephrase it.

MR. WINGET-HERNANDEZ: I'll rephrase the question. May I get a drink of water, Your Honor?

THE COURT: Of course. Very good tactic. That will give you a little time to think about your question.

MR. WINGET-HERNANDEZ: Thank you. I appreciate the comment as well. That will give me a chance for another one.

THE COURT: Maybe the witness would like one, too.

(BY MR. WINGET-HERNANDEZ)

Q Are you doing all right?

A I'm fine.

Q Do you have an opinion, sir, based upon the knowledge gained in your capacity as the head of the – essentially, the museum, of which the Ten Commandments monument is one cultural artifact, of that artifact's value in terms of its historical and secular nature?

MR. VAN ORDEN: Your Honor, I would renew the objection. He's testifying about his opinion, and yet he's not been designated as an expert. He's obviously relying on somebody else. It would also be hearsay.

[66] THE COURT: The objection is overruled. The rule does permit a layperson to express an opinion if it's based on his personal knowledge and experience. So I'll instruct the witness it has to come from that, not on what somebody else has told you. But to that extent you may answer the question.

THE WITNESS: Could you repeat the question?

(BY MR. WINGET-HERNANDEZ)

Q Tell us in your opinion whether the Ten Commandments monument has secular or historical value.

A Yes, it does.

Q Tell us what the position of the state board of preservation is with respect to the historical value of the monument.

A You mean my board members individually or –

Q No. I mean the official position of the agency.

A Well, the position of the agency is that it is an educational historical monument that's been there since 1961, that was moved during the capitol extension construction project, was replaced in its approximate former location, and it's a monument that we maintain.

Q More specifically, Mr. Crawford, isn't it true that the state preservation board's position with respect to the monument is that the monument itself has historic value

because it shows – it's an example of the community creating [67] an ecumenical religiously tolerant offer of a means by which youth can understand and appreciate a code of moral conduct?

A Yes.

Q And isn't it also true that the monument itself has historical value because of its longevity in that position?

A Yes.

Q And isn't it also true, sir, that the state's position with respect to the text of the monument is that the text forms the basis, in part, in some aspect of the secular law?

A Yes, sir.

Q And isn't it also true that the position of the monument is what it is as a result of the studied opinion of the Board of Control, which was charged with its positioning, and that that opinion – and that that position reflects a relationship which is direct between the Supreme Court, the monument and the legislative houses residing in the capitol?

A I believe they referred to the rotunda of the capitol. And the answer is yes.

Q With respect to Exhibit Number 2, and looking at the sketch which is the second page, is it clear to you that there was purpose behind the placement of the monument directly between the Supreme Court Building and the center of the capitol?

A In the exhibits that we looked at this weekend, there was a reference to positioning it there by the Board of [68] Control, yes, sir.

Q If you'll look at the first page of Exhibit Number 2, I think you'll recognize that.

A Yes, sir.

Q Doesn't that statement, which is – I'll just read it. "It is the studied opinion of this division that the location for the monolith of the Ten Commandments donated to the state and dedicated by the Fraternal Order of the Eagles be shown on the attached photocopy."

And then this is signed by the chief of the Building Engineering and Management Division. Isn't it true, sir, that the state board of preservation's position with respect to that statement is that the engineering and management division, which was in charge of placing the monument, studied the entire capitol grounds for a suitable location for the monument and chose a position directly between the Supreme Court and the state house?

A Yes, sir.

Q And that that position is a function in part of the relationship of the text of the monument to the functions of those two respective branches of government represented by those buildings.

A Could you ask that –

Q Namely the making of laws and the interpretation of laws.

[69] A Could you ask that again, please.

Q Well, the state board of preservation recognizes and takes the position that the placement of the monument reflects the relationship between the Ten Commandments

themselves and the making and the interpretation of secular laws.

A I believe that's true. Yes, sir.

Q Is it also the position of the state board of preservation that the Ten Commandments serve a secular purpose in the sense that they seek to bind the society and community in shared values?

A I believe so, yes, sir.

Q Isn't it also true, sir, that the state board of preservation's position and official opinion about the Ten Commandments is that although they're a religious source, that that functioned as a part of generalized culture – a generalized cultural ethic for many, many generations across hundreds of years, to a great extent through all of western Europe and what is now North America?

A Yes, sir.

Q The state board of preservation through the capitol curator has attempted to place the Ten Commandments monument in context for the reasonable observer, has it not?

A I'm sorry. You are going to have to ask me that again.

Q Isn't it true, sir, that the capitol curator was [70] discharged with the responsibility of creating a self-guided tour that would put the Ten Commandments monument in its proper context among the other monuments that exist on the capitol grounds?

A Yes, sir, that's true.

Q And just so that we can know what we are talking about, how is it that this self-guided tour is actually promulgated and published to the public?

A They are available in the tour guide office, or you can take – we have tour guides that give you tours of the building. We don't have guided tours of the grounds. What we hand out is a map that shows you the locations of all the monuments and an explanation thereof.

Q Is that what appears as Exhibit Number 4?

A It is.

Q If you'll just open that copy up so that you can see the map. Now, you have already indicated that we don't give tours. You mean the tour of the grounds is not guided by a person.

A That's right.

Q But the state actually condones and has established this tour as being – it would be the officially suggested means of approaching the monuments; isn't that right?

A Yes, sir.

Q The objective there is to make sure that the observer [71] understands the context of each of the monuments.

A That's correct.

Q And in fact, not only the monuments but also has provided interpretive information by means of signs that help the visitor or the viewer understand the history of the

capitol itself even with respect to objects and installations which no longer exist.

A That's true.

Q This is a part of the educational function of the state board of preservations; isn't that right?

A State preservation board, yes, sir.

Q And additionally these interpretive signs are important for putting the capitol and its grounds in context because they provide historical references; isn't that right?

A Yes, sir.

Q The monuments themselves, of course, have historical references or constitute historical references as well as references to secular ideals, such as freedom, and cultural ideas, which are both of importance to Texas, like the contribution of women, for example, in Texas history.

A That's true.

Q Isn't it also true, sir, that the self-guided tour is provided to the public as a self-guided tour so that individuals have a choice about what monuments they choose to look at and which ones they choose not to look at.

[72] A Well, it's a suggestion of route to take if you are going to look at all the monuments. And I guess you could choose which ones you wanted to see, if you want to see any of them.

Q In fact, if the state board – if the state preservation board had wanted to actually guide people to the Ten

Commandments monument, it could have done so by hiring tour guides to take them by it; isn't that right?

A They could have.

Q But instead they chose to give people the opportunity to either look at it or not depending on the information that was provided to them in the self-guided tour.

A That's correct.

Q With respect again to the placement of the monument, can you tell the court what essentially constitutes the front of the capitol.

A Historically the south capitol grounds are more historic than the north. And so the main entrance has always been considered to be the south entrance.

Q So, conversely, is the north entrance considered the back entrance?

A Yeah. I don't know if it would be the back entrance or not. We have engaged in the past some statistics, people from the University of Texas, to help us figure out how many visitors came to the capitol every year. And they had a [73] formula for counting the people at each one of the doors. The capitol visitors' parking garage has been open just in the last four years, which probably changed the approach that a lot of people took. So I think probably that the south door is the most frequented; probably the east door, second most; and then maybe the north door followed by the west.

* * *

get there. But certainly the north door is not the most frequently used.

Q Is it quite clear that the west door is the least frequently used door of the four?

A I don't know that it's quite clear. I would hate to get in trouble with the House side folks, thinking their door was used less, but I think with the creation of the visitors' parking garage on the east side of the capitol, the east door is probably used more than the west.

Q For visitors approaching the capitol from –

A And that may all change because of security issues once the session starts. And that hasn't been decided yet.

Q In fact, these matters of ingress and egress change on a seasonal basis as well, don't they?

A You mean which door's frequented the most?

Q I guess the numbers really is –

A Certainly the number of visitors changes seasonally and whether or not it's an even- or odd-numbered year.

[74] Q Do you anticipate that with the changes in security, that visitors will be routed through a single entrance?

A That decision has not been made.

Q Is there any likelihood that the west entrance will be more greatly utilized as a result of security measures?

A I don't think so.

Q When the general public approaches the capitol to visit, do you know whether it's more likely than not that they park in the visitors' parking?

A There are more people that would park in the visitors' parking than would park at a meter, I believe. And the visitors' parking garage is free for the first two hours, and

* * *

parking garage attracts the most visitors.

Q On the diagram that appears on Exhibit Number 4, can you tell – describe for the court where the parking garage is located with respect to, let's say, the library and archives building.

A It is the city block due east of the library and archives building.

Q So in order to orient the viewer to the Ten Commandments monument, the tour shows that the Ten Commandments monument is – or the Ten Commandments monument is reflected on the diagram as Number 9, is it not?

A That's correct.

[75] Q And Number 9 is essentially to the west of the three most frequented doors of the capitol.

A Yes, sir.

Q And facing in the southwesterly direction or toward the west entrance of the capitol.

A Yes, sir.

Q And visitors coming from the east would encounter all three, south, east and north entrances, before they would come into close contact with the Ten Commandments monument; isn't that true?

A Well, they certainly would encounter the east and the north. If they went to the south side of the building, they would encounter – would come to the south door, as well.

Q Well, in any event, the south entrance is closer to the parking garage, to the visitors' parking garage, than the Ten Commandments monument is, is it not?

A That's true.

Q Now, in order to assist the court in understanding the context in which the Ten Commandments monument appears on the capitol grounds, the defendants have produced a videotape of the entire walking tour of the capitol grounds. Have you seen that videotape?

A I have.

Q Does it accurately represent what a person might see if they followed the sanctioned, self-guided tour?

[76] A Yes, sir, it does.

MR. WINGET-HERNANDEZ: With the court's permission, Your Honor, I will set up this videotape so we can talk through that tour. It may take me just a moment.

THE COURT: This is – let me be sure I understand you. This is something that was produced for purposes of this trial?

MR. WINGET-HERNANDEZ: That's correct, Your Honor.

THE COURT: This was not a standardized video that his agency or somebody produced.

MR. WINGET-HERNANDEZ: It's not a publicity video, Your Honor. It's purely for purposes of showing what an individual following this tour would actually see on the advice of the defendants.

THE COURT: What's your exhibit number?

MR. WINGET-HERNANDEZ: Forty-three, Your Honor.

THE COURT: And there again, are we talking about Defendant's Exhibit 43 or just the generic Exhibit 43?

MR. WINGET-HERNANDEZ: All the exhibits that have been offered and admitted into evidence are joint exhibits, Your Honor.

THE COURT: So this book that he's holding here that has numerous exhibits, photographs, what have you, it skips from 42 to 44 or something, because this is 43. There's not a duplication.

[77] MR. WINGET-HERNANDEZ: There is actually – there is actually in the binder an indication that Exhibits 43, 44 and 45 are comprised of videotapes.

THE COURT: There's not a duplication is what I was getting at.

MR. WINGET-HERNANDEZ: There's no duplication, Your Honor.

THE COURT: There's only one 43.

MR. WINGET-HERNANDEZ: That is correct.

THE COURT: And how long does this production run?

MR. WINGET-HERNANDEZ: Well, the entire tour lasts 57 minutes.

THE COURT: Are you going to show all of that?

MR. WINGET-HERNANDEZ: It was my intention to show the whole thing; however, Your Honor, we have also admitted into evidence a 38-minute version of this video which speeds up the approaches and the departures from each of the points of interest.

THE COURT: Well, your witness has testified that on this self-guided tour map, that it's Number 9. Are you starting with Number 1 on your video?

MR. WINGET-HERNANDEZ: I was, Your Honor. I was going to start with Number 1. Of course, this video is in evidence.

THE COURT: How long does it take to get to Number [78] 9?

* * *

(BY MR. WINGET-HERNANDEZ)

Q Number 9 is about halfway through the tour, Your Honor.

THE COURT: So we are still talking about nearly half an hour.

MR. WINGET-HERNANDEZ: That's correct.

THE COURT: Well, one wonders whether this trip is really necessary. What do you say, Mr. Van Orden?

MR. VAN ORDEN: It depends on how the court defines context. If he starts looking at monuments on the

other side of the capitol down by 11th Street, it's a pretty good stretch to say that's part of the context.

THE COURT: Well –

MR. VAN ORDEN: I don't think it's unfair.

THE COURT: No, I'm not saying it's unfair. I'm just saying that it may be unnecessary. I can take judicial notice of where it's located and what it's close to. I have seen it a number of times. I have seen other monuments on the capitol grounds a number of times. I have been in and out of the capitol building a number of times.

MR. WINGET-HERNANDEZ: Of course, Your Honor. And we have already offered and the exhibits have already been admitted. The court certainly has recourse to those exhibits if it wishes to review them. We have provided the different [79] versions precisely so that we could meet and address this problem. The third videotape is joint Exhibit Number 45, which is about ten minutes long.

THE COURT: And what's that?

MR. WINGET-HERNANDEZ: This videotape also contains the entire tour; however, it's been edited. It doesn't – it contains the entire – all of the points at interest that are marked on the tour; however, for the most part, we are just talking about the digital still shots that were taken – that were culled out of the video that was shot and which constitutes Exhibit 43.

THE COURT: Well, I don't think it would be an efficient use of time to be showing those in the courtroom because they are in evidence. They were admitted into evidence without dispute. In fact, by agreement. And I just don't see the need for it.

MR. WINGET-HERNANDEZ: Very well, Your Honor. We won't burden the court or the audience with a lengthy video presentation.

THE COURT: I'm really not concerned about the audience.

MR. WINGET-HERNANDEZ: We would suggest to the court that – well, I'll just ask the witness.

(BY MR. WINGET-HERNANDEZ)

Q Is it your contention, Mr. Crawford, as the executive [80] director of the state preservation board that the context of the Ten Commandments monument constitutes the entire capitol grounds and all of the monuments and interpretive signs which the state preservation board has placed on the capitol grounds?

MR. VAN ORDEN: Your Honor, I object. In terms of this case, what is context is a matter for the court.

THE COURT: Objection sustained.

(BY MR. WINGET-HERNANDEZ)

Q Does Exhibit Number 4 reflect an attempt by the State of Texas through the state preservation board to assist a person who is visiting the state capitol grounds to put the monuments and the other features of the state capitol grounds in their appropriate context?

A Yes, sir.

Q With respect to that context and specifically the monuments which share the northwest quadrant of the

capitol grounds, can you tell us, please, which monuments those include.

A The northwest quadrant?

Q The northwest quadrant. That's correct.

A I guess it would be monuments Number 9 through 15 on this guide, which would be the Ten Commandments, the Tribute to Texas Children, the Texas Pioneer Woman's Monument, Statue of Liberty replica, which is a boy scout donated monument.

[81] The Pearl Harbor Veterans' monument, the Korean War Veterans' monument and Soldiers of World War I monument.

Q Now, quickly, the exhibits in the notebook which have been admitted that represent those various monuments and signs appearing on the capitol tour begins at Exhibit Number 5. I would like you to flip to Exhibit Number 5 quickly, if you will.

A Okay.

Q Isn't it true, sir, that the state preservation board has reflected the endorsement of the State of Texas on the sign which is represented there by Exhibit Number 5, about the general land office building by placing the seal of the State of Texas on the sign?

A That's true.

Q And isn't that also true of all the other interpretive signs that appear on the self-guided tour?

A I believe that's correct. The signs that reflect monuments that were no longer there and the monuments

themselves, the signs, all the plaques have the seal of the state. I believe.

Q If you'll turn to Exhibit Number 9 quickly.

A Yes, sir.

Q This is the first monument that appears on the guided tour; isn't that right?

A Yes, sir.

[82] Q And that is the monument to Hoods' Brigade, a confederate brigade?

A Yes, sir.

Q The endorsement in the form of a star or seal of Texas does not appear anywhere on this monument, does it?

A I don't see one, no, sir.

Q However, there is a representation of the relationship between the State of Texas and the confederate states that appears in the form of a flag in the center of the pedestal.

A Yes, sir.

Q Moving on to Exhibit Number 12, which is in the north side of the capitol grounds, and which is – shares the north lawn with the Ten Commandments monument, this is the peace officers' memorial and the newest one that appears on the capitol grounds; isn't that right?

A That's correct.

Q And the state's imprimatur or endorsement of this monument appears in the form of the lone star at the base

of the most prominent portion of that memorial; isn't that right?

A There is a lone star at the base of that monument.

Q With respect to Exhibit Number 13, the monument to the disabled American veterans of the State of Texas, that monument is endorsed by the seal of the State of Texas, the star with the oak leaves. Isn't that right?

[83] A Yes, sir.

Q Actually appearing embossed in the granite.

A That's correct.

Q Turning to Exhibit 15, the Korean War monument, you are aware, are you not, sir, that the front portion of this monument, which is not reflected in this photograph, contains a large brass seal of the State of Texas bearing the lone star and the laurel wreaths and so forth.

A Are you talking about on the plaque that explains the monument?

Q On the granite pedestal that appears on the south side of the monument.

A Yes, sir, I believe that's correct. And, in fact, that monument when seen from overhead is a star itself, the entire monument.

Q The Exhibit Number 16, which is the monument to the veterans of World War I, contains a star as well, does it not, showing the endorsement or the imprimatur of the State of Texas?

A It has a star on it, yes, sir.

Q And in fact it also has a reference to the deity, God, country, war, endorsed or inscribed on the face of the monument.

A I believe it says God, country, peace.

Q Excuse me. God, country, peace.

[84] THE COURT: So you endorse peace rather than war; is that correct?

THE WITNESS: Yes, sir.

(BY MR. WINGET-HERNANDEZ)

Q Yes. I think that other monuments show our endorsement of wars, do they not? Some wars?

A I think the other monuments are credits to the people who fought in various wars. I don't know that it endorses a war.

Q Good. With respect to Exhibit 17, the Pearl Harbor Survivors' Association, monument to the survivors of Pearl Harbor?

A Yes, sir.

Q This monument also bears the engraved lone star of the State of Texas, does it not?

A It has a star, yes, sir.

THE COURT: That's exhibit what, counsel?

MR. WINGET-HERNANDEZ: That's Exhibit Number 17.

(BY MR. WINGET-HERNANDEZ)

Q With respect to Exhibit Number 18, we cannot tell from this photograph whether or not Exhibit 18, a copy of the replica of the Statue of Liberty, bears the star of the State of Texas, can we?

A No, sir.

Q Are you aware whether it does?

[85] A I'm no aware.

Q And can you tell us just – tell us who gave that statute to the State of Texas.

A That statue was given to the State of Texas by the boy scouts. It was located on the south capitol grounds prior to the historic south capitol grounds restoration project. The time period for the capitol restoration period was from 1888 to 1915. So the agency sought to take the building and its contents back to that time period. There was approximately 50 years added to that period with respect to the monuments. So any monument that would have been put on the grounds very recently would have been moved to the north side because they hadn't been on the south side historically. And this monument was one of those that was moved, I believe, and there made be a plaque there that explains that.

Q The Ten Commandments monument was not however, moved was it?

A It was picked up and stored while the underground extension building was built. And it was put back in the approximate location.

Q By the way, when the monument was replaced, its orientation was modified, wasn't it?

A Yes, sir.

Q Do you know whether or not it's previous orientation was?

[86] A I believe I can look at Exhibit 4.

Q I think that's 2, actually.

A I'm sorry. I believe if it look at Exhibit 2, that I can see that the orientation was towards the north door or generally in that direction, which would make it face south and east. But during – what this exhibit does not show is a new sidewalk that goes from the general area of the monument to the John H. Reagan Building and to the Supreme Court Building. So I know that the orientation of the monument was changed during the capitol restoration project, but I do not know why.

Q Was the practical result of the change in the orientation of the monument that it became less conspicuous overall?

A I think that it is less conspicuous than had it faced the north door. And now it generally faces the intersection of an old sidewalk and a new sidewalk.

Q Has there ever been any history of the state preservation board or other agencies governing the capitol grounds and the capitol contents making changes in the orientation or placement of cultural artifacts in order to accommodate the objections of observers?

A I believe there has been.

Q Is there any reason – do you have any reason to believe that that was not the case here?

[87] A No sir. I don't have any reason to believe that it was not. But I don't know that it was. I do know about a plaque inside the building which was relocated after the restoration project, I believe in part, to put in a more obscure area than it had previously been located.

Q With respect to the exhibit number – well, before we leave Exhibit Number 18, the Ten Commandments – the reverse of the Ten Commandments monument is blank, is it not? There are no –

A What exhibit are we on now?

Q Right now we are talking about 18. I'm leading up to a question on 18.

A Eighteen. That's the boy scout one.

Q The Statue of Liberty. I'll ask you a different question. You can see the reverse of the Ten Commandments monument from a vantage point directly in front of the Statue of Liberty monument, can you not?

A Yes, sir. Not completely the reverse, but you can see the back side of the monument.

Q All right. And my previous question was, the back side of the monument, what does it reflect?

A I believe it's just blank.

Q The next monument that's depicted in the photographs is Exhibit Number 19, the Texas Pioneer Woman, correct?

A That's correct.

[88] Q That monument was established in order to promote the idea that Texans and visitors to the capitol should celebrate and understand the role that women played during the same formative period of our state that was represented by the many representations of men on the capitol grounds. Isn't that right?

A Yes, sir.

Q And this monument shares a fairly close relationship to the Ten Commandments monument, does it not?

A Yes, sir.

Q In fact, this is one of the closest monuments to the Ten Commandments monument, isn't it?

A Yes, sir, I believe it is.

Q And this monument is also endorsed by the State of Texas with a lone star appearing on the pedestal.

A There's a lone star on the monument, yes, sir.

Q Looking at Exhibit Number 20, this is – by the way, the Pioneer Woman was installed in 1998, wasn't she?

A I believe that's right.

Q And in the same year the Tribute to Texas Children was installed, according to Exhibit Number 4. Right?

A Let me look at that. I did not recall them being installed the same year, but they were installed approximately the same year.

Q That appears on the first page. If you will look at the [89] front of Exhibit Number 4 on the second column in the last paragraph.

A Pardon me. Where?

Q On the first page – I'm sorry. I'm looking at the copy on the front page. Yes. In the second column and the last paragraph. Texas Pioneer Woman 1998.

A Yes, sir. That's correct.

Q All right. And one of the purposes – well, can you speak to the purposes generally of the representation of these children?

A Yes, sir. What exhibit number was that?

Q Exhibit 20, please.

A This monument to honor Texas school children was a result of a bill that was passed by then Representative Libby Leinbarger who was involved in the chairman of the House Education Committee part of the process of coming up with the monument, was to engage an artist, sculptors type professional from Houston, who came up with My Cats, which are miniature models of these – the monuments.

And then they were put into full size and bronzed. And they basically are – this is one of the most visited monuments on the grounds, as witnessed by the fact that the grass around it – we have a hard time keeping the grass alive because little children come to have their pictures taken among the bronze kids.

[90] Q The bronze children represent a broad cross section of diverse cultures, do they not?

A They do.

Q And in fact, there is at least one religious reference among the children, is there not?

A There is.

Q Can you tell the court what that is.

A It is a cross on the school girl depicted on this exhibit. One of the young ladies is dressed in a school uniform type of outfit, and on her chest is a cross.

Q Hanging – a small cross hanging from a chain?

A That's correct.

Q Are you aware of whether – well, do the other school children have any religious – do they wear any religious symbols or other indicators, indicia of their faiths?

A I don't know. I mean I have looked at that cross recently. I see that one of the other girls has something on her neck like a necklace, but that could be a blouse. I'm not sure. I just know that the one girl has a cross.

Q Would it – was it the attempt or was it one of the specifications of the bill or the intent of the legislature expressed through the state preservation board in soliciting contributions or – not contributions, but soliciting artwork for this that the images represent a broad cultural representation of the children of the State of Texas?

[91] A I think that's probably correct. I know it was the artist's intent that we have different race children, and it was his intent that it be very diverse. I'm sure that would have been the legislature's too.

Q Is it apparent from the monument and from the work that was done in order to establish it that the message that was being sent was one both of cultural and religious diversity?

A I think so.

Q This is the closest monument to the Ten Commandments monument, is it not?

A I believe it is. The Pioneer Woman's monument that you see in the background, it's relatively close as well, but I believe this would be closer if we took a tape measure out there.

Q And is it reasonable in your opinion for an observer to understand in viewing these monuments together that this is an expression of cultural and religious diversity that might and should –

MR. VAN ORDEN: Object again. He's going into his opinion about whether a reasonable and –

THE COURT: We have let you testify a lot, counsel, but I'm going to sustain the objection to that one.

MR. WINGET-HERNANDEZ: All right, Your Honor.

(BY MR. WINGET-HERNANDEZ)

Q Mr. Crawford, isn't it your job in a sense to shape the [92] perceptions of the viewers of the monuments at the capitol grounds?

A Well, certainly we feel like our agency has over time increased its mission to be generally – you know, we manage visitors to the capitol and the museum, experience

of those facilities. So, you know, that's what we think we do. In addition to taking care of the grounds, we manage the visitor's experience.

Q In managing the visitor's experience, was it your intent to convey a secular message of tolerance for diverse cultures and religions by putting this monument up?

A Well, I certainly believe that would have been the author's intent, to show diversity. And I believe that's what the legislature knew they were buying into when the monument was passed. You know, the artists a lot of times have a lot of freedom as well. I believe that that was the legislative intent, was to show the diversity.

Q If it had been the purpose of the legislature to endorse Christianity or Judaism, would it have been possible – without respect to whatever your legal opinion might be about it, but would it have been possible for them to specify figures, all of which contain either specific references to Christianity or Judaism, in order to show that endorsement?

THE COURT: Are you still talking about the children's monument?

[93] MR. WINGET-HERNANDEZ: Yes. I'm still talking about the children right there next to the Ten Commandments.

THE WITNESS: Ask it again, please.

(BY MR. WINGET-HERNANDEZ)

Q Wouldn't it have been possible for the state to specify that not just one out of six of the figures show some

religious affiliation, but all of them show that they are either Christians or Jews?

A I mean I suspect that the legislature could have done, you know, whatever it wanted to do with respect to that, but you are asking me to – I do not know whether the fact that one of these children has a cross was the intent of the legislature or whether it was, you know, the freedom that the artist had. I can refer to a terrazzo floor in the museum which we commissioned a friend of mine to design. It's a campfire scene as seen above. And there's a mission there, and there's a missionary. Both the mission has a cross on top of it and the missionary has a cross. That's not something we commissioned. We didn't tell the artist to do that. That was the artist's decision. That's what he dreamed up.

Q In fact, isn't it also true that all the monuments that appear in the capitol grounds are donated in some form or another to the State of Texas by someone else?

A With the exception of the newest monument, in which the [94] legislature did some cost sharing, the peace officers monument. The rest of the monuments, my understanding, were all donated – the funds from those monuments were all donated; they were not appropriated money.

Q And the artistic expression of the donor is not the subject of legislative enactment in any case except perhaps the peace officers memorial; isn't that correct?

A That's my understanding, yes, sir.

Q And that is also evident in the way – in the appearance of Exhibit Number 21, the Ten Commandments monument; isn't that true?

A This was a monument that was contributed, donated to the state by the – as it reads here, by the Fraternal Order of Eagles of Texas in 1961.

Q And it's quite clear that the legislature had nothing to do with the artistic expression or the ecumenical statement that was being made in the face of this monument; isn't that right?

A The written record referring to this monument refers to the senator who passed this senate resolution or this House member. There's no reference to any other action other than the vote was unanimous in the Senate and, I believe, also in the House.

Q So we can – while we are there, let's look quickly at Exhibit Number 1.

[95] A Okay.

Q Exhibit Number 1, in the second – well, in the first paragraph explains that the Fraternal Order of the Eagles for several years has placed across the country in courtrooms, classrooms and public places parchment plaques and granite monoliths of the ten Commandments. And then it goes on to say, "These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency."

Do you see that?

A Yes, sir.

Q Does it appear to you that the Senate jointly with the House was adopting – by accepting this gift was adopting the purpose that was expressed by this bill?

A Yes, sir.

Q Additionally, it also indicates in the last paragraph that the Eagles of the State of Texas be commended and congratulated for its efforts – that the order be congratulated for its efforts in contributions and combating juvenile delinquency throughout our nation and granted permission to have the monolith placed on the grounds.

A That's correct.

Q And in fact, among the – among the rationales for placing the monument on the state grounds, this is the one – this one is independent of the Eagles, is it not? I mean the [96] state here is congratulating the Eagles; the Eagles are not really congratulating themselves.

A That's correct. This is Senate Concurrent Resolution Number 16, 1961.

Q All right. And it shows – the exhibit further goes on to show the history of – the legislature history of the adoption of that restitution.

A That's right. And that's all the history that I believe we could find.

Q Please look at Exhibit 21 again. Now, you have during – in preparation for this trial you have examined the Ten Commandments monument in some detail, have you not?

A I have.

Q Have you found the endorsement of the State of Texas on this monument in the form of a seal of the State of Texas or a star?

A I have not.

Q And no such –

A There are two stars, but they are six-pointed stars as opposed to five, I believe, on the monument.

Q Moving on to Exhibit Number 23.

A Okay.

Q This is the next monument that appears on the tour, is it not? And that is the monument to the fighting men of the 36th Infantry, which is the Texas division of the national [97] guard?

A Yes, sir.

Q And then Exhibit Number 24 is a tribute to the soldiers who served in the Spanish-American War?

A That's correct.

Q Next on the tour would be an exhibit, Exhibit 26, which is a tribute to the Texas cowboy?

A That is correct.

Q Now that was a gift from somebody outside the State of Texas, wasn't it?

A What exhibit is that?

Q Exhibit Number 26.

A I'm not sure.

Q Exhibit Number 30 is the next exhibit on the tour, isn't that right?

A Yes. That's Terry's Texas Rangers.

Q And the lone star appears on this monument on several places, does it not?

A I don't see it in the picture.

Q It's not apparent from the photograph. Are you aware that the state seal or the lone star appears on this monument?

A I'm not surprised, but I was not particularly aware of that. If you say it's there, I'm sure it is.

Q Let's look at Exhibit Number 31.

[98] A Yes, sir.

Q This is the next monument on the tour, is it not?

A Yes, sir.

Q And it reflects the events of the battle of the Alamo.

A It is a tribute to the heroes of the Alamo.

Q And of course the lone star is emblazoned or all four ordinants of this particular memorial, is it not?

A I believe that's correct, yes, sir, and certainly you can see one of them in this paragraph.

Q Behind the photograph you can see on the pediment to the north entrance – excuse me – to the south entrance of the capitol the seals of the six nations of Texas; isn't that right?

A Yes, up at the top of the building.

Q And that also appears on the pediment of the north entrance to the building, correct?

A That's correct. And those two seals are also referenced in the rotunda floor as well.

Q So there's three separate representations of these seals that are prominently displayed for the public to see?

A Yes, sir.

Q And those – the seals over the doors are not historical to 1888, are they?

A No, they are not.

Q Tell us why those seals are there.

[99] A Well, during the restoration project the – you know, there's always a tug of war between someone who is really a preservationist and maybe someone who is maybe not so committed. And because this was a newer feature to the capitol, was outside the restoration period, they were not put back on the building. In the next session after the restoration period the legislature passed a law and said put them back. So that was about the time I got there. And one of my first functions was to put them up there. They are there by legislative directive.

Q Are there religious or mythological references in those seals that are apparent to any observer?

A I believe that –

MR. VAN ORDEN: I'm going to object whether they are apparent to any observer.

MR. WINGET-HERNANDEZ: Let me ask you a different way.

THE COURT: The objection is sustained. He can't testify as to what some observer might or might not observe.

(BY MR. WINGET-HERNANDEZ)

Q The seals that appear on the pediments of the north and south entrances, generally speaking, are they visible from most vantage points, either north or south of the capitol?

A Generally speaking, they are. They are pretty high up. I mean the same seals are replicated in the floor when you [100] would stand right on top of them.

Q And the subject matter of the seals, does the subject matter include references to any cultural sort of ideology or mythology or religion?

A I believe at least one and possibly two reference the seal of – the country of Mexico has a bird with a snake, I believe, in its mouth and had to do with – I don't know if it's mythology, but some – why Mexico City is located where it is, which I have been told has to do with some native Mexican mythology with respect to that location of the city.

Q And is it the position of the state preservation board that the state is taking – is endorsing the religion of ancient Aztec mythology by making those seals a prominent fixture on the capitol entrances?

A I don't think so.

Q Or on the floor of the rotunda.

A I don't think so.

Q There are, incidentally, other references to deities on monuments throughout the capitol grounds, are there not?

A There are.

Q And throughout the capitol building itself?

A That's true.

Q Moving on to Exhibit Number 34, which is the tribute to the volunteer firemen –

A Yes.

[101] Q – this exhibit is one of the last stops on the self-guided tour, is it not?

A I believe it is, yes, sir.

Q And it's placed towards the south entrance of the capitol grounds? Number 4. On Exhibit Number 4?

A Yes, sir. That's right.

Q That monument is endorsed by the State of Texas as reflected by the star, the lone star that appears on the pediment as well; isn't that right?

A The moment has a star on the monument, it looks like.

Q Finally the last monument in the tour is the monument to the confederate dead, which is –

A Yes.

Q – also located at the south entrance to the capitol, correct?

A That's correct.

Q Exhibit Number 38 reflects a close view, a photograph of the seals that appear on the north entrance; isn't that correct?

A That's correct.

Q And the documents behind it reflect the legislative – the legislative appropriation directing their replacement after the renovation?

A It was in on a rider to an appropriations bill, I believe, that suggested that we put those seals up before we [102] appropriate any money.

Q Exhibit number –

THE COURT: Pretty strong suggestion.

THE WITNESS: Yes, sir.

(BY MR. WINGET-HERNANDEZ)

Q Excuse me. Exhibit Number 39 shows a close-up of the seal that you were referencing that depicts the Aztec myth.

A Yes, sir.

Q And then in Exhibit 40 it shows the terrazzo floor containing the seals of the six nations on the floor of the rotunda and describes what the contents of the various seals are and what they suggest.

A That's correct.

Q This publication that is a part of Exhibit Number 40 is actually text for a brochure that is provided to the public, is it not?

A I believe that's correct.

Q And it discusses the Mexican seal featuring the Aztec legend concerning the future location of a capital in Mexico?

A Yes, it does.

Q And then other efforts that the state preservation board has made to create a historical context for – a faithful historical contact for visitors to the capitol include efforts to restore certain rooms; isn't that correct?

A That's correct.

[103] Q Exhibit Number 41 reflects such a restoration, does it not?

A Can I –

Q Exhibit 41.

A Can I go back? Can I go back to the last question?

THE COURT: You want to complete an answer? Go ahead.

THE WITNESS: Yes. I want to make sure that the question before last, which had to do with the reference of the Mexican seal within this – you know, I answered that yes, it did contain that. I'm not seeing it here. Would you point that out to me.

(BY MR. WINGET-HERNANDEZ)

Q Of course.

A I believe it's there, but I haven't seen it.

Q Page – there are three pages of text following the photograph.

A Right.

Q The second one, which is Page 7.

A Uh-huh.

Q In the second paragraph?

A Right.

Q The first sentence.

A Right.

Q Reads the Mexican seal features –

[104] A The feature location, yes, sir.

Q All right. Exhibit 41.

A Yes, sir.

Q Describe for the court, please, what restoration effort the state preservation board went to in order for us to be able – for visitors to be able to see the faithful historical context of the capitol and it's contents.

A Okay. This is a subject that I do know quite a bit about. During the capitol restoration project and in the planning for the project, I as a member of the speaker's staff and, I believe, the speaker as well – I know the speaker and others involved in the legislative process were very concerned that this restoration process would turn the capitol into even more of a museum than it already was. And it had – the concern had to do basically twofold; one, experience that we had heard of that happened in California, where they restored the building so much back to the way it was, it wasn't practical to be an office building.

So, you know, we wanted to make sure that this was a functioning capitol once it was through, and we didn't just turn it into a museum where we had to go down the street and build a capitol.

So this Exhibit 41 reflects the old Supreme Court room, which is one of the ten most historically significant rooms in the capitol, and is one of the rooms that is more like a [105] museum than we would have wanted, than I would have wanted at the time in my then capacity.

The room across the hall from this on the third floor is The Court of Criminal Appeals, and it too is like a museum room. One of the reasons that his Supreme Court is so fabulously restored is because we got a big grant from some corporation to do that. And this is probably the most historically significantly restored room in it.

There's also the Treasurer's building room on the first floor where the tour guides are. The House and Senate chambers themselves are among the ten most historic places, as is the agricultural museum, which appears on the first floor on the northwest corner. And that room is specifically called a museum.

Then there's the original governor's office and the secretary of state's office. I'm sorry. What the others are doesn't come to mind immediately, but, you know, certainly if the building wasn't a museum before the restoration project, it certainly was more of a museum afterwards; and this room shows that.

Q One of the features in this room – describe to us the features in this room essentially that are actually original pieces and the ones that are not. Just very briefly.

A Some of these – well, I know the dais, the court's dais, is original to the room. Over a period of time that [106] dais – because the court grew from three judges to nine, the dais was expanded and moved to the other side of the room, and a big window was covered over. And that's because of the placement of the two doors on the north side of the room wouldn't allow for a dais big enough to accommodate nine people.

So during the restoration process, this dais was taken back to its original size and put back on the south side of the room. And the drapery there is obviously not original, although I understand that the preservation board staff at the time was able to find a piece of the drapery someplace, and they had it replicated to the extent they could.

The carpet in this room is replicated based on finding a piece of the original carpet. Some of the furnishings in the room are original and some are – some are replicas; and I'm not trained to know the difference, but my staff certainly can tell you.

Q Speaking of the difference in your staff's directives with respect to reproductions and historical artifacts, have you directed the state curator to take charge of historical artifacts in an accounting sense?

A Certainly our – the capitol – the curator of the capitol accounts for each of the historic objects in the capitol, and there's a number assigned to each object. And there's a computer bar code assigned to the objects, and she [107] does keep an inventory by number of objects.

Q These numbers include designations such as CHA and RCHA, isn't that right?

A Capitol historic artifacts and replicas, those two different classifications.

Q And each object actually has eight a CHA number or an RCHA number, if it's an historic artifact; isn't that right?

A I believe that's correct.

Q In this room, for example, the bench of the Supreme Court would have a CHA number.

A That's correct.

Q And the chairs or some of the chairs, which are reproductions, would have an RCHA number, correct?

A That's correct.

THE COURT: Are you leading up to something relevant to this case?

MR. WINGET-HERNANDEZ: I am. I am, Your Honor.

(BY MR. WINGET-HERNANDEZ)

Q My next question, which is, does the Ten Commandments monument on the capitol grounds have a CHA number.

A I believe it has a CHA number, yes.

Q Finally, with respect to the Supreme Court courtroom in the capitol, the dais or as you referred to it, the dais or the bench of the Supreme Court, has an inscription on it as well; isn't that right?

[108] A That's correct.

Q And that inscription is faithfully reproduced on the last page of Exhibit Number 41.

A That's correct.

Q And that Latin inscription has been translated for publication to visitors and other interested persons as, quote, Just as to our father's, may God be to us. End quote.

A That's true.

MR. WINGET-HERNANDEZ: If you'll give me just a moment to confer with my co-counsel, Your Honor, I think I may be ready to pass this witness.

We will pass the witness, Your Honor.

MR. VAN ORDEN: May we take a short break?

THE COURT: Yes, we may. Short recess.

(Brief recess).

THE COURT: Any questions for the witness?

MR. VAN ORDEN: I have just a very few questions, Your Honor.

CROSS-EXAMINATION

(BY MR. VAN ORDEN)

Q Hello, Mr. Crawford.

A Hello.

Q Mr. Crawford, I believe from your testimony you recognized that the 1961 legislature in the joint resolution – I believe we have here is Exhibit 1 – accepted [109] from

the Fraternal Order of Eagles of Texas the donation of the Ten Commandments monument.

A That's correct.

Q And that the legislature set forth their purpose in doing so and in displaying the monument. Is that correct?

A Yes, sir, that's correct.

Q Now, in several parts of your testimony on direct examination I thought I understood you were trying to articulate one or more purposes for displaying the monument today that are in addition to or perhaps different from what the '61 legislature said. Is that correct?

A Well, certainly the monument today is part of history. And so that would be, I think, in addition to what they intended at the time. It's been there since 1961. Forty-one years.

Q Were you trying to articulate a purpose or purposes for the state preservation board or the State of Texas displaying that monument on the state capitol, that those purposes being in addition to or different from what the '61 legislature said?

A I think the '61 legislature referred to the morality of youth, and certainly, you know, I don't think that would be any different today.

Q So that purpose to promote morality, that purpose holds today with the state preservation board.

[110] A Certainly.

Q Are there other purposes that you were trying to articulate on direct examination for displaying the monument?

A I believe I testified that at least some of the commandments are the basis of what our laws are, what I understand, you know, our laws to be. And again, I think that this monument in and of itself is historic.

Q All right. So do I understand that one purpose, then, one additional purpose is, the monument is being displayed to celebrate it as a source of western law? I don't want to put words in your mouth. It sounded like that's what you were saying.

A Well, the monument refers to the Ten Commandments. A lot of the Ten Commandments, you know, are reflected in the law. Thou shalt not kill. It's illegal in Texas to kill someone, I believe, except in self defense. There are other commandments that – there are laws that prohibit the same action that the commandment advises against or commands.

Q Is that a purpose of the state preservation board in displaying that monument?

A I mean the monument isn't doing anything wrong being there. Our charge is to take care of the monument and to maintain it. You know, I think that you have to look at the Senate concurrent resolution on its face and say that that was the legislative intent that established the monument at [111] the time.

THE COURT: It's a real simple question that could be answered with a yes or no, I think.

THE WITNESS: Okay. I'm sorry. Could you repeat it?

THE COURT: Is that a purpose for the state preservation board in displaying the monument. Yes or no or I don't know.

MR. VAN ORDEN: Celebrations –

THE COURT: Don't start talking until he answers.

THE WITNESS: I don't know for sure.

THE COURT: Next question.

(BY MR. VAN ORDEN)

Q Can you think of any other purposes that the state preservation board has or that the State of Texas has for displaying the monument as it's displayed other than what the '61 legislature said in their joint resolution?

A Again, the fact that it's been there for 41 years and it's historic in and of itself.

Q Before today has there ever been an agenda item before the state preservation board where the board voted on a purpose or purposes for displaying the Ten Commandments monument?

A I don't think so. But I don't know that to be true. The board inherited the Ten Commandments monument when it was [112] established in 1984 after the 1983 fire at the capitol. So whatever inventory it was on before the creation of the board is how we acquired it. And since, you know, it's been our mission to maintain it.

Q On your watch the board has never had an agenda item where it voted on establishing one or more purposes for displaying the monument; is that correct?

A That's correct. Not on my watch.

Q Before today have you publicly made a pronouncement as to a secular governmental purpose for displaying the Ten Commandments monument before taking the witness stand today?

A You know, certainly in preparation for today, you know, we have discussed this. So if your question is – could you ask your question again?

Q Yes, sir. My question is whether or not the state preservation board had made a public – I don't mean working with your lawyers in getting ready for today, but the board itself, has it ever made a public declaration or issued a resolution declaring that the monument is being displayed for a secular purpose and maybe defining what that purpose is?

A Not to my knowledge.

Q To the extent that you have attempted today during your testimony to articulate a secular purpose, would it be fair to say that this is the first time, in court today, that the board through you or through someone else has attempted to [113] articulate a secular purpose?

A What I attempted to do today was answer the questions.

Q I know that. Sure. But is it your belief that the board does have a secular purpose for displaying the monument different from what the '61 legislature said?

A You know. I think there are arguments that you could make that there are secular purposes.

Q I understand there may be arguments you can make, but does the board have a purpose in displaying the monument? Not that – you could make arguments all day, but when those arguments are finished and the board can say, "Here's why we are displaying this monument" –

A Well, I think that the board still feels the way the resolution that created it did, that has to do with morality and –

Q Okay. That's fine.

THE COURT: Don't interrupt while he's answering the question. Please go ahead and complete your answer.

A The board is interested in maintaining the monument there, and they don't want to take it down.

Q I'm sure that's certainly true. You indicated, I think, when you were talking about the board creating the pamphlet that's essentially on the walking tour, independent walking tour, that it's passed out to capitol visitors if they want to go see the monuments. They have the guide there. And I [114] thought when you began your testimony in that area, you indicated that that walking tour was created for the purpose of putting the Ten Commandments monument in context. Is that correct? Is that why that was created?

A I don't think I indicated that. I think that I answered questions of counsel in that this walking tour does in fact put it in context. But whether or not that was the purpose, I wouldn't think – the purpose of the tour is to

guide people through the monuments and give them some background on each. It also – the further purpose of the self-guided tour is to show people where monuments use to be. Monuments such as the Austin Lawyers' Wife Star or the realtors monument, which was there from 1976 to 1996.

But because it wasn't part of the historic restoration period, the monument was removed and now there is a bronze plaque along the walkway near the monument, near where the realtor's monument stood that says, "On this site stood the realtors' monument, the realtors' centennial monument, for twenty years, from 1976 to 1996.

And the same kind of plaque appears where the lagoon on the west side of the building used to be. It also appears – again, the Austin Lawyers' Wife's Star and maybe other places for a period of time. But it wasn't there during the historic restoration period. So we have a plaque that says, [115] on this site used to stand this greenhouse, and this is about the greenhouse.

Q I think earlier you testified that one of the functions of the state preservation board was an educational function.

A Yes, sir.

Q Does the display of the Ten Commandments monument fit into an educational program of the board's?

A I don't think it would be adverse to any educational program that we have.

Q Is it part of – I mean are you displaying it as a part of an educational program?

A I don't know that it's a part of it. I just don't think it's adverse to it. I mean, you know, the whole capitol and the grounds and all the monuments are educational.

Q Is the display of the Ten Commandments monument a part of an educational program that is promulgated and put into effect by the state preservation board?

A It's part of history.

Q Is it a part of the educational program?

A It's certainly – I don't know how – to me it would be part of an education program because, you know, it educates our youth and others as to things that you should do and should not do. But whether we have incorporated it into our educational program, I can't say that. It is talked about in this tour.

[116] Q Is part of the purpose of it being out there to teach the youths of Texas the precepts on that monument?

A I think part of the purpose of it being there is to teach the youth of certain life standards and guidelines to follow to, you know, have a better morality among youths.

Q As articulated on that monument?

A I think the monument says you shouldn't kill people.

Q It does?

A And I think the monument says other things that we have laws that are similar to. And to the extent that that's educating someone, I think that it's educational. But I don't know that it was an intentional part of our educational function to say that it is educational.

Q Let me ask you if you can just –

A I'm trying.

Q I know you are. I was sitting up there before trying too, so I'm sympathetic. Let me ask you one more time. You said that part of the function of the state board is education.

A That's right.

Q And my question was, is the display of the Ten Commandments monument an element in that educational function of the state board.

MR. WINGET-HERNANDEZ: I think he's answered the question, Your Honor.

[117] THE COURT: I thought his answer was that it was not adverse to it, but I'm not sure that that's really directly an answer. See what you can come up with.

MR. WINGET-HERNANDEZ: I withdraw the objection.

THE WITNESS: Your Honor, if the monument were removed for some reason, then, you know, what we have done in other places where the monuments have been removed is to have a bronze plaque that explained what used to be there. So I would suggest that it would not be inappropriate to have a plaque that said, if it were removed, that on this site stood a monument for 41 or 42 years in tribute to the Ten Commandments. And here's what is said.

That would be educational at that point because it would tell you about a history, something that took place there for, you know, that period of time, 41 or two years. I

think – my personal belief is that the Ten Commandments are part of history and they are educational as well in a sectarian sense as well as in a religious sense. That's my opinion. I don't know how to answer your question without giving my opinion.

(BY MR. VAN ORDEN)

Q Let me see if I can help you along. If I were to concede that teaching of the Ten Commandments is not hurting anybody –

A That's what you testified to.

[118] Q The U.S. Supreme Court even said it may be a laudable goal, it may be a laudable function to teach the Ten Commandments. So we are not talking about it in those terms. But I'm just trying to determine whether as far as the educational program that monument is part of it and it is – in furtherance of an educational program, we are using it to teach the youth the precepts on the monument.

A I think that's –

Q I'm not trying to put a value judgment on it.

THE COURT: He was about to answer, and you interrupted. Go ahead.

A I think that's in the eye of the beholder. And in my opinion there's a lesson to be learned by knowing what's on that monument. You know, I have already spoken to the history of the monument itself and the history of the words on it. But, you know, I can tell you that our board has taken no formal action saying that this monument is here, so we teach these children this. The original action

was that we addressed the morality, the decline of the morality of our youth.

Q Okay. I think that's as far as we can go with that. We are kind of going in circles now. Let me ask – one of the photographs; it would be Exhibit 49 and Exhibit 50, the photographs that I contributed to this book.

A Forty-nine and 50?

[119] Q Yes.

A Okay.

Q I guess 48 and 49, probably.

A Okay.

Q Those photographs, you agree, depict how the monument is displayed?

A Yes, sir.

Q What's around it, what's nearby and what the viewer sees when he looks at the monument?

A Yes, sir.

Q Has the State of Texas, state preservation board in particular, taken any action to try to mitigate a perception that may flow from that display in that context that the state is endorsing religion or endorsing the Ten Commandments or endorsing Christianity and Judaism? Has the state taken any action to do that?

A To do what now?

Q To mitigate –

A And that means diminish?

Q Diminish –

THE COURT: Any kind of disclaimer. Have you disclaimed endorsement?

(BY MR. VAN ORDEN)

Q Disclaim endorsement. Have you done anything to disclaim endorsement?

[120] A I don't think so.

Q Have you done –

A We haven't endorsed it. I don't think there's been any formal action on the monument.

Q The court will end up deciding that. Whether it's endorsement or not is a legal question, I guess.

THE COURT: He's asking you the reverse of that, whether you have taken any affirmative action to disclaim endorsement.

THE WITNESS: I don't think we have taken action one way or the other.

THE COURT: Either way.

(BY MR. VAN ORDEN)

Q Have you taken any action to disclaim a religious purpose in displaying the monument that a viewer would see?

A I don't think we have taken any action one way or the other on this monument other than to accept it. The inventory was given to the agency and to maintain it since.

MR. VAN ORDEN: Your Honor, I believe I have no further questions.

THE COURT: Any other questions?

MR. VAN ORDEN: Thank you, sir.

THE WITNESS: Thank you.

REDIRECT EXAMINATION

THE COURT: This would be redirect, I suppose.

[121] MR. WINGET-HERNANDEZ: Yes, Your Honor.

(BY MR. WINGET-HERNANDEZ)

Q First of all, you testified as to what you would do – you testified on cross-examination as to what you would do it you were ultimately ordered to remove the monument in terms of you would replace – you would put a plaque there. Right?

A That would be my suggestion.

Q And you described what the plaque would contain.

A Right.

Q And you testified that it would contain a representation of what the inscription on the now absent monument had been.

A That's correct.

Q Which is the Ten Commandments. Right?

A That's correct.

Q And what would you do, if you had your choice, with the monument itself if it were ordered removed from its present location?

A Because we operate the Bob Bullock Texas State History Museum and because there is some credit for historic artifacts from the capitol being at the museum, I would suggest that if we were required to move it after whatever legal process concluded, that we consider putting it in the museum. Maybe next to the Goddess of Liberty. You know, the original Goddess of Liberty that was on top of the capitol for over a hundred years was made out of zinc and, as such, [122] it couldn't be restored during the restoration process. So it was replicated out of aluminum. And the statue that you see on top of the building now is a replication of the original. The original is at the Bob Bullock Texas State History Museum. So I would think that would be an appropriate place for it if we were required to move it.

Q So what you are telling us then is that – if you look for an example at Exhibit Number 6. You mention that the sign would be similar to the sign like is shown in Exhibit Number 6 that has a picture of the object that no longer exists or no longer is in the position. And then it has text describing it. That would be the nature of the plaque.

A Yes.

Q Right?

A It would be just like all the other plaques, I would suspect.

Q So what we would have is, we would have a plaque with a photograph of the Ten Commandments monument.

We would have text reproducing the Ten Commandments themselves and then we would have another display in the other museum, which is the Bullock museum, of the actually Ten Commandments itself.

A That would be my suggestion.

Q Resulting in essentially two more iterations of the Ten Commandments at the location where the monument is now and then the third monument in a public place in the museum, in [123] the Bob Bullock museum.

A That would be my suggestion.

Q All right. Exhibit Number 4, the self-guided tour, is produced by the state preservation board, right?

A That is correct.

Q And when – do you understand that the production and the dissemination of this Exhibit Number 4 constitutes state action?

A I hadn't thought of that, but it certainly, I guess, does.

Q When you were answering Mr. van Orden's question about the state not taking any action to disclaim a religious endorsement, were you thinking of some kind of act of Congress?

A I was thinking about some formal board meeting or some act of the legislature.

Q All right. In fact, on your direct examination didn't you testify that the very placement of the monument itself is designed to emphasize not the religious aspect of the monument, but its secular relationship to our laws?

A You know, I would have to read exactly what I testified to, but I would think that – could you ask the question again.

Q Let me take it back one step further. Didn't you testify on direct examination that the monument was placed [124] where it was originally, in the studied opinion of the board of controls –

A That's correct. Between the courtroom and the rotunda of the capitol.

Q Did that constitute state action?

A That did at the time.

Q And in your opinion does that action – was that action taken to mitigate or ameliorate the impression of endorsement of religion?

MR. VAN ORDEN: Your Honor, if I could object.

THE COURT: Sustained. The action, whatever it was, speaks for itself.

(BY MR. WINGET-HERNANDEZ)

Q In taking the action of creating the tour, was it the purpose of the state board, the state preservation board, to put the monument in the context of the other monuments and artifacts on the state grounds?

A Certainly.

Q In your opinion does the placement of the monument within the context of the other monuments, by its physical location or by its position in the self-guided tour, tend to mitigate the message of religious endorsement that might appear to you from the face of the monument?

A Well, it's certainly one of the smallest monuments that we have. It's not in the most prominent location. It's not [125] as though it were at the front door, which is the south door. It's at the north door, which is less used. So I think in the context of all the other monuments and the building itself, which to some extent is a monument, it's pretty small by comparison.

Q You say the building itself is a monument. You mean that in a general sense, I suppose. Do you know – let me ask you a different way.

In your mind the capitol itself is a monument to what kind of ideals or aspirations?

A The capitol itself was a monument to, you know, really big thinking people at the time who were so broke that they didn't have the money to pay for a capitol building, but who had a lot of land and traded 3 million acres in what is now the panhandle, to the Farwell brothers out of Chicago, who in exchange for the 3 million acres that was called the XIT Ranch, came here and built the largest state capitol, I'm sure, at that time.

You know, it was on a prominent hill. It was a monument to the strong will of the people who, you know, founded and ran the state at that time.

Q In reducing your testimony to its essence, is it fair to say that the capitol is a monument to the strength of the State of Texas and to the freedom of its people?

A It is to me.

[126] Q Sir, those ideals or those ideas that are expressed by the monument of the capitol itself are secular ideas, aren't they?

A I believe they are.

Q And the monument of the capitol itself far overshadows the monument of the Ten Commandments in your opinion, doesn't it?

A Literally.

Q The monuments that were placed in close proximity to the Ten Commandments monument fairly recently – and here I'm speaking specifically of the Texas Pioneer Woman and the Texas Children. Those are monuments to cultural diversity and – well, of all kinds of diversity, are they not?

A I believe they are.

THE COURT: You are getting a little repetitious now, counsel. This is supposed to be redirect.

MR. WINGET-HERNANDEZ: My point here, Your Honor – and what I'll get down to is –

(BY MR. WINGET-HERNANDEZ)

Q Sir, on cross-examination you testified that you weren't aware of action taken to disclaim endorsement. Are you limiting that testimony on cross-examination to formal action as in passage of a bill or a resolution or something of that effect?

A I'm limiting it to a formal board member meeting. I [127] can't think of any meeting that we have had since I have been executive director where the board took a position one way or the other on this monument. And I can't think of any legislative action since I have been there, either.

MR. WINGET-HERNANDEZ: Pass the witness, Your Honor. Any other questions on recross?

MR. VAN ORDEN: No, Your Honor.

THE COURT: No recross. You may step down. Any other defense witnesses?

MR. WINGET-HERNANDEZ: We are not bringing any more witnesses, Your Honor.

THE COURT: Let's get our original exhibits back. The witness had them up there. No further witnesses for the defense?

MR. WINGET-HERNANDEZ: No further witnesses, Your Honor.

MR. VAN ORDEN: I have nothing further.

THE COURT: So you rest and close?

MR. VAN ORDEN: I'm sorry, Your Honor.

THE COURT: You close?

MR. VAN ORDEN: Yes, sir.

THE COURT: You, too?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THOMAS VANORDEN,	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. A 01 CA 833 H
RICK PERRY, et al.	§	
Defendants.	§	
	§	

STIPULATIONS OF THE PARTIES

TO THE HONORABLE JAMES R. NOWLIN, UNITED STATES DISTRICT JUDGE:

Plaintiff THOMAS VAN ORDEN, and Defendants RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; BILL RATLIFF, in his official capacity as Co-Vice Chairman, State Preservation Board; JAMES E. "PETE" LANEY, in his official capacity as Co-Vice Chairman, State Preservation Board; DAVID CAIN, in his official capacity as Member of the State Preservation Board; TONY GOOLSBY in his official capacity as Member of the State Preservation Board; JOCELYN LEVI STRAUS in her official capacity as Member of the State Preservation Board; RICK CRAWFORD in his official capacity as Executive Director, State Preservation Board, file their Stipulations of the parties, and would respectfully show the Court as follows:

1. In 1961, the State of Texas, by a Joint Resolution of the Texas House of Representatives and the Texas Senate, accepted from the Fraternal Order of the Eagles of Texas, a private entity, the donation of a granite monument inscribed with the Ten Commandments for installation on the Capitol grounds.

2. The Senate Concurrent Resolution (No. 16) appears as Exhibit 1.

3. The legislative history of the enactments in the House and Senate contain no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of the House and Senate Journal entries which appear as part of Exhibit 1.

4. The promotion of morality is a valid secular purpose.

5. The donation included installation at a site selected by the State. The physical labor and cost of installation were borne exclusively by the Eagles.

6. The site location was considered and recommended by the Building Engineering and Management Division of the State Board of Control. The recommendation appears at Exhibit 2.

7. The location of the monument is roughly on a line drawn between the Supreme Court and the Rotunda, about 75 feet from the Capitol, measured due South from the monument to the nearest wall. The original site and orientation of the monument comports with the recommendation shown at Exhibit 2.

8. Ownership of the monument passed to the State at the time of installation.

9. The monument's dedication was presided over by Senator Bruce Reagan and Representative Will Smith. No official record exists of the participation of any other person.

10. The monument was continuously displayed on the Capitol grounds until it was removed and placed in

storage for its protection in June 1990 at the direction of the State Preservation Board for the excavation and construction of the Capitol Extension.

11. The monument was re-installed at its original location on March 26, 1993 at the direction of the State Preservation Board. The cost of removal, storage and re-installation of the monument was included in the total price of the Capitol Extension Project. The Project was paid for with funding appropriated to the State Preservation Board.

12. Upon its re-installation, the monument was turned to face Southwest, toward the West entrance of the Capitol. This constituted a variance of almost ninety degrees from its original Southeast-facing orientation.

13. The State Preservation Board maintains all monuments located on the Capitol Grounds including the Ten Commandments monument.

14. In 1995, the monuments were surveyed in preparation for the Historic South Capitol Grounds Restoration Project. This survey was authorized by the State Preservation Board. There were a total of 24 monuments surveyed, including the Ten Commandments monument.

15. The survey cost of $30,000 was for the complete monument collection. An individual cost per monument is not available. This cost was paid by the State Preservation Board.

16. During the Restoration Project (September 1995 to May 1996), the State Preservation Board spent $402,000 in donated and granted funds to clean, stabilize and refinish all monuments. The individual cost per monument is not available. The Ten Commandments monument

is very simple in terms of materials and needed only to be washed and polished.

17. In 1998, the monuments' conservator returned to conduct a preventative maintenance check, make minor repairs as necessary, and to train State Preservation Board facilities personnel in proper conservation techniques. The cost of this project was $22,000 for the entire monument collection, paid for by the State Preservation Board. There was no need to engage in any preservation work on the Ten Commandments monument at that time.

18. The Ten Commandments monument is maintained by the State Preservation Board facilities division on a regular basis, approximately every six months. This maintenance consists entirely of washing the monument with water and detergent, and polishing it with a cloth. No other maintenance of the Ten Commandments monument has ever been required.

19. Because of its simple construction and durable material, the State Preservation Board does not anticipate the need for any other kind of maintenance or preservation for the Ten Commandments monument in the foreseeable future.

20. The State Preservation Board has promulgated, and publishes a self-guided walking tour of the Capitol Grounds.

21. The Capitol, together with its grounds and the monuments erected maintained there, constitute a National Historic Landmark. Exhibit 3.

22. The Ten Commandments monument is one element of a legally-protected National Historic Landmark.

23. The published self-guided tour, together with photographs of the monuments and the foundry's proofs of the interpretive signs appear as Exhibits 4 through 37.

24. A videotape of the tour, showing the entire length of the walk prescribed by the State Preservation Board, appears at Exhibit 43. A second videotape, edited to show the walks between points of interest at high speed, appears at Exhibit 44. A third videotape fo [sic] the same tour, edited to show only the immediate views at each of the monuments and interpretive signs along its course, appears at Exhibit 45.

25. The State Preservation Board publishes literature about the Capitol Complex for distribution to Capitol visitors. This literature is made available through the Capitol Complex Visitors Center and the Visitor Services-Capitol Tour Guide Office, both divisions of the State Preservation Board.

26. The State Preservation Board maintains a web site which includes a photograph of the Ten Commandments monument. A partial reproduction of the website appears at Exhibit 46.

27. The Visitor Services-Capitol Tour Guide Office gives tours of the Capitol Building and Capitol Extension. Since March 1999, when databases compilation began, the Visitor Services-Capitol Tour Guide Office has provided tours to 3,680 school/class field trips ranging from preschool through high school and involving 186,269 participants.

28. The compiled data understate the actual numbers because some groups schedule late or just show up; therefore, they do not get entered into the database. Also, some scheduled groups do not show for their tours. Groups that come annually are only counted once in the database. These guided tours are of the Capitol Building and Capitol Extension only. The State Preservation Board does not conduct guided tours of the Capitol grounds or monuments.

29. Exhibit 4 is made available to the participants and they are free to tour any and all of the monuments on their own.

30. The Tribute to Texas Children monument, erected in 1998, is a popular stop for participants on school/class field trips.

31. The Ten Commandments monument is located 111 feet from the Tribute to Texas Children monument, 120 feet from the Texas Pioneer Woman monument and is among the closest monuments to the Capitol Building at a distance of 75 feet.

32. The Ten Commandment monument contains no deliberate imprimatur of the State of Texas by way of seal or star, or any other official emblem of the State or of any of the defendants.

33. Trial Exhibits 1-66, inclusive, are admissible in evidence in all respects.

Respectfully submitted,

/s/ Thomas Van Orden
THOMAS VAN ORDEN
Plaintiff Pro Se

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General for Litigation

TONI HUNTER
Chief, General Litigation Division

/s/ Michael Winget-Hernandez
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Attorneys for Defendants

EXHIBIT 1

SENATE CONCURRENT RESOLUTION NO. 16

WHEREAS, The Fraternal Order of the Eagles for the past several years have placed across the country, in courthouses, classrooms and public places, parchment plaques and granite monoliths of the Ten Commandments; and

WHEREAS, These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency; and

WHEREAS, The Fraternal Order of the Eagles request permission to present a granite monolith to be placed on the grounds of the State Capitol of Texas; now, therefore, be it

RESOLVED, By the Senate of the State of Texas, the House of Representatives concurring, that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas.

/s/ Ben Ramsey
President of the Senate

/s/ James A. Furman
Speaker of the House

I hereby certify that S. C. R. No. 16 was adopted by the Senate on February 14, 1961.

/s/ Charles Schnabel
Secretary of the Senate

I hereby certify that S. C. R. No. 16 was adopted by the House on February 22, 1961.

/s/ [Illegible]
Chief Clerk of the House

Approved:

March 10, 1961
Date

/s/ Price Daniel
Governor

BILL AND RESOLUTIONS
SIGNED BY THE SPEAKER

The Speaker signed in the presence of the House after giving due notice thereof and their captions had been read severally the following enrolled bill and resolutions:

* * *

S. C. R. No. 16, Regarding the setting up of monuments on public grounds

* * *

February 22, 1961

HOUSE JOURNAL

* * *

REGARDING THE SETTING UP OF
MONUMENTS ON PUBLIC GROUNDS

The Speaker laid before the House for consideration at this time,

S. C. R. No. 16, Regarding setting up of monuments on public grounds

The resolution having hereto been referred to the Committee for Rules and reported favorably by the Committee.

S. C. R. No. 16 was adopted.

* * *

TUESDAY, FEBRUARY 14, 1961

* * *

Senate Concurrent Resolution 16

Senator Reagan offered the following resolution:

S. C. R. No. 16, Commending and authorizing the Fraternal Order of the Eagles to erect a monolith on the Capitol Grounds.

Whereas, The Fraternal Order of the Eagles for the past several years have placed across the country, in courthouses, classrooms and public places, parchment plaques and granite monoliths of the Ten Commandments; and

Whereas, These plaques and monoliths have been presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency; and

Whereas, The Fraternal Order of the Eagles request permission to present a granite monolith to be placed on the grounds of the State Capitol of Texas; now, therefore, be it

Resolved, By the Senate of the State of Texas, the House of Representatives concurring, that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas.

The resolution was read.

On motion of Senator Reagan and by unanimous consent the resolution was considered immediately and was adopted.

* * *

EXHIBIT 2

May 15, 1961

TO: Mr. Wm. J. Burke, Executive Director

FROM: R. Aubrey Smelser, Chief, Building Engineering and Management Division

SUBJECT: Site Location of a Monolith of the Ten Commandments

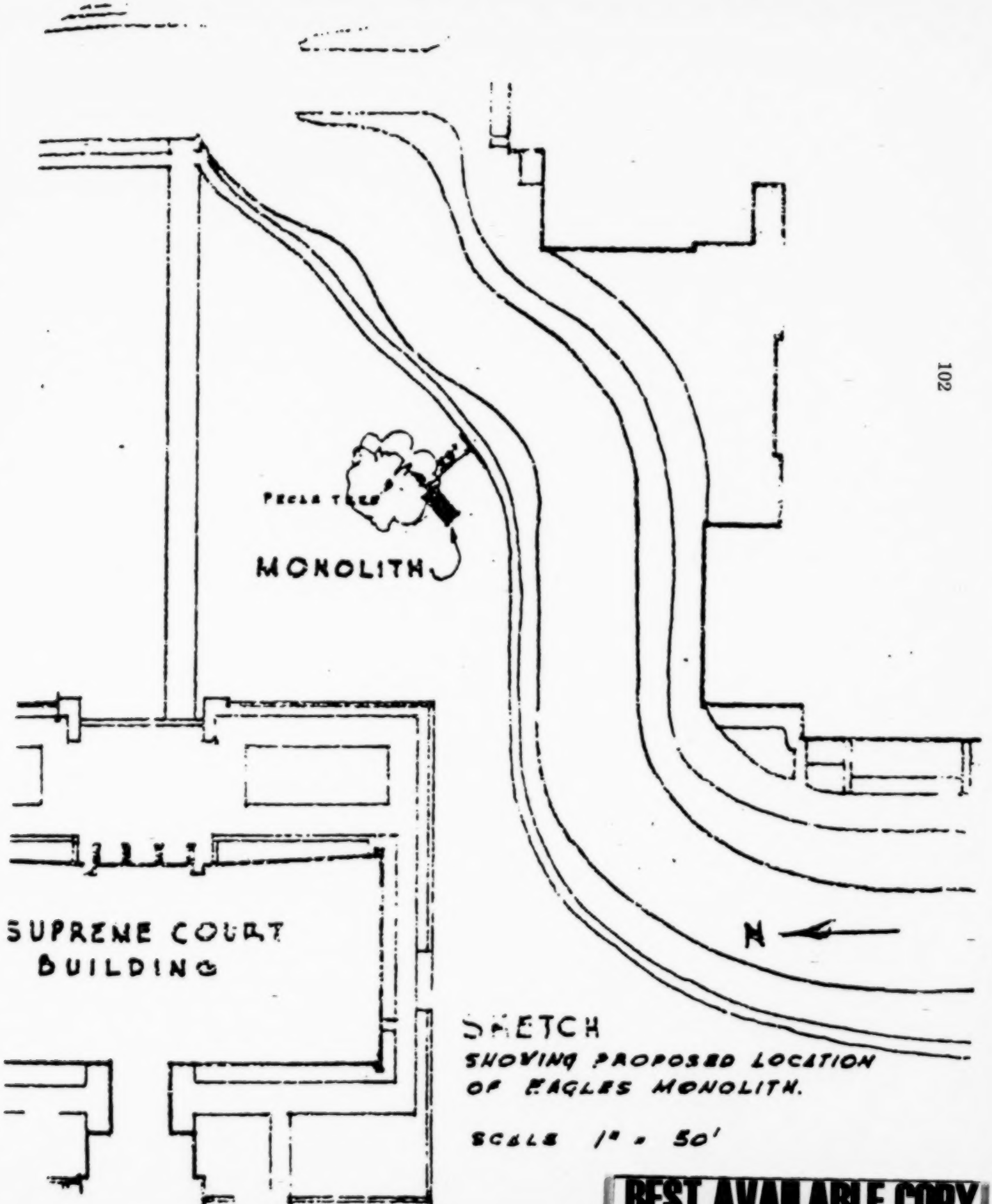
It is the studied opinion of this division that the location for the Monolith of the Ten Commandments donated to the State and dedicated by the Fraternal Order of Eagles be as shown on the attached photocopy.

The site location has been marked by stakes so that a visual inspection of the location can be made. The actual foundation dimensions have not been furnished to us and the stakes show only the approximate dimensions.

Respectfully submitted:

/s/ R. Aubrey Smelser
Chief, Building Engineering
and Management Division

RAS:kr
Attachments



SKETCH
SHOWING PROPOSED LOCATION OF EAGLES MONOLITH.

SCALE 1" = 50'

BEST AVAILABLE COPY

EXHIBIT 3

[LOGO] United States Department of the Interior

NATIONAL PARK SERVICE
P.O. BOX 37127
WASHINGTON, D.C. 20013-7127

IN REPLY REFER TO:
H34(418)

Honorable Frank Cooksey
Mayor of the City of Austin
134 W. 8th Street
P.O. Box 1088
Austin, Texas 78767

Aug 8 198[illegible]

Dear Mayor Cooksey:

I am pleased to inform you that the property identified on the enclosed sheet has been found to possess national significance in the history of the United States. As a result, the Secretary of the Interior has designated it a National Historic Landmark.

The purpose of landmark designation is to identify and recognize nationally significant sites and to encourage their owners to preserve them. Landmarks are chosen after careful study by the National Park Service. They are evaluated by the National Park System Advisory Board and designated by the Secretary of the Interior in accordance with the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966.

Designation as a National Historic Landmark automatically places a property in the National Register of Historic Places, if it is not already so listed, and extends to it the safeguards and benefits provided by the National Historic

Preservation Act of 1966 and other Federal laws protecting historic properties.

We are pleased to include this property on the roll of National Historic Landmarks as a significant representative of our nation's heritage.

Sincerely,

s/ Edwin C. Bearss

Edwin C. Bearss
Chief Historian

Enclosure

IDENTICAL LETTERS HAVE BEEN SENT TO THOSE PEOPLE LISTED ON THE ATTACHED SHEET

bcc: Mr. Roy Graham
Architect of the Capitol
P.O. Box 13286
Austin, Texas 78711

Mr. John C. Ferguson
Texas Historical Commission
P.O. Box 12276
Austin, Texas 78711

[A] Texas State

Honorable Frank Cooksey "Mayor Cooksey"
Mayor of the City of Austin
124 W. 8th Street
P.O. Box 1088
Austin, Texas 78767

[A] Texas State

Honorable Mark White "Governor White"
Governor of the State of Texas
State Capitol Building, Room 200
Austin, Texas 78711

[A] Texas State

Honorable Mike Renfro "Mr. Renfro"
County Judge, Travis County
P.O. Box 1748
Austin, Texas 78767

[A] Texas State

Honorable Bill Hobby "Mr. Hobby"
Lieutenant Governor of the State of Texas
and President of the State Senate
P.O. Box 12068
Austin, Texas 78711

[A] Texas State

Honorable Gib Lewis "Mr. Lewis"
Speaker of the House
House of Representatives
P.O. Box 2910
Austin, Texas 78769

[A] Texas State

Mr. Curtis Tunnell, Executive Director "Mr. Tunnell"
Texas Historical Commission
P.O. Box 12276
Austin, Texas 78711

THE STATE OF TEXAS
[LOGO]

CURTIS TUNNELL
EXECUTIVE DIRECTOR

TEXAS HISTORICAL COMMISSION

P.O. BOX 12276 AUSTIN, TEXAS 78711 (512) 475-3092

[Names Omitted In Printing]

January 14, 1986

Mr. Edwin C. Bearss
Chief Historian
History Division
National Park Service
Department of the Interior
1100 L Street, N.W.
Washington, D.C. 20013-7127

Dear Mr. Bearss:

Enclosed is the revised nomination for the consideration of the Texas State capitol as a potential National Historic Landmark. The comments contained in your letter of December 3, 1985 were taken into consideration in the rewriting of the nomination, in addition to the corrections noted on the copies of the first draft which was submitted to you in November of 1985.

It is our understanding that this nomination, along with the photographic documentation which you have on file, will be presented to the National Park System Advisory Board for their consideration at their Spring meeting. If there are any additional questions concerning the nomination, please feel free to contact John C. Ferguson, Architectural Historian, at 512-475-3094.

Thank you again for your consideration of this nomination, and for the assistance of your staff in answering our questions regarding the National Historic Landmark designation process.

Sincerely,

/s/ Joe Oppermann
Joe Oppermann
Deputy State Historic
Preservation Officer

JO/jcf
Enclosure

United States Department of the Interior
National Park Service — For NPS use only

National Register of Historic Places — received

Inventory – Nomination Form — date entered

See Instructions in *How to Complete National Register Forms*
Type all entries – complete applicable sections

1. Name

historic Texas State Capitol

and or common

2. Location

street & number Congress Avenue and 11th Street
N/A **not for publication**

city, town Austin N/A **vicinity of**

state Texas **code** 048 **county** Travis **code** 453

3. Classification

Category	**Ownership**	**Status**
___ district	_x_ public	_x_ occupied
_x_ building(s)	___ private	___ unoccupied
___ structure	___ both	___ work in progress

___
___ site
___ object

Public Acquisition
N/A in process
___ being considered

Accessible
___ yes: restricted
___ yes: unrestricted
_x_ no

Present Use

___ agriculture
___ commercial
___ educational
___ entertainment
_x_ government
___ industrial
___ military
___ museum
_x_ park
___ private residence
___ religious
___ scientific
___ transportation
___ other:

4. Owner of Property

name State of Texas

street & number

city, town Austin N/A **vicinity of** **state** Texas

5. Location of Legal Description

courthouse, registry of deeds, etc. Travis County Courthouse

street & number

city, town Austin **state** Texas

6. Representation in Existing Surveys

title Texas Historic Sites Inventory

has this property been determined eligible x **yes** _ **no**

date 1964 _ **federal** x **state** _ **county** _ **local**

depository for survey records Texas Historical Commission

city, town Austin **state** Texas

9. Major Bibliographical References

Temples of Democracy: The State Capitols of the U.S.A., Henry-Russell Hitchcock and William Seale. 1976. Harcourt, Brace, Jovanovich, New York and London.

The Preservation of the Texas State Capitol. Diane Susan Jones. Unpublished Masters Thesis, School of Architecture, University of Texas at Austin, 1980. (continued)

10. Geographical Data

Acreage of nominated property 27 acres
Quadrangle name Austin East, Tex
Quadrangle scale 1:24,000

UTM Reference

	Zone	Easting	Northing
A	14	621050	3349800
B	14	621400	3349700
C	14	620900	3349540
D	14	621260	3349540
E			
F			
G			
H			

Verbal boundary description and justification The twenty-seven acre site is bonded on all sides by the cast- and wrought-iron fence which defines the perimeter, generally bonded by 11th Street on the south, 14th Street on the north, Colorado to the west and Brazos to the east.

List all states and counties for properties overlapping state or county boundaries

state N/A **code** **county** **code**

state N/A **code** **county** **code**

11. Form Prepared By

name/title John C. Ferguson, Architectural Historian

organization Texas Historical Commission **date** December, 1985

street & number P.O. Box 12276 **telephone** (512) 475-3094

city or town Austin **state** Texas 78711

12. State Historic Preservation Officer Certification

The evaluated significance of this property within the state is:

_x_ national __ state __ local

As the designated State Historic Preservation Officer for the National Historic Preservation Act of 1966 (Public Law 89-665), I hereby nominate this property for inclusion in the National Register and certify that it has been evaluated according to the criteria and procedures set forth by the National Park Service.

State Historic Preservation Officer signature
/s/ Curtis Tunnell

title State Historic Preservation Officer **date** 13 Jan 1986

For NPS use only

I hereby certify that this property is included in the National Register

date

Keeper of the National Register
Attest: **date**

Chief of Registration

EXHIBIT 4

The 1888 Capitol and approximately 22 acres of surrounding Grounds are the physical and symbolic center of government for the State of Texas. Bounded by city streets, the Grounds today provide an appropriate setting for citizens and visitors to approach and appreciate the majestic Texas Capitol. The Historic Grounds lie on the east, south and west sides of the building and are defined by an historical iron fence. In 1993, the completion of the Capitol Extension created an entirely new setting for the north side of the Capitol.

The 1995-96 restoration of the historic Grounds returned the park-like setting to its 1888-1915 appearance and updated vital systems such as fire protection, water-conserving irrigation, lighting and accessible walkways. To learn more about the Grounds, please read the history introduction below and then follow the self-guided tour. People using wheelchairs are advised to follow existing direcitonal [sic] *signage and customize their tour as needed. Interpretive signs located throughout the historical Capitol Grounds are marked on the map with a* K.

HISTORY

A Special Session of the 20th Legislature ended the day before the Texas Capitol was dedicated on May 16, 1888. That Legislature passed an act to hire a civil engineer to improve the Grounds of the new Capitol which needed considerable attention. In addition to the detrimental impact of the building construction project, the landscape was marked by wood retaining walls and steps from the old limestone Capitol which had burned on the site seven years before. William Munro Johnson was appointed

engineer and devised a plan that emphasized the perpendicular relationship between the granite Capitol and Congress Avenue. His vision included curving, stone-edged carriage drives, a "Great Walk" of black and white diamond-patterned pavement shaded by trees and a decorative iron fence on a stone base.

By the time the first monument was installed on the Capitol Grounds in 1891, commemorating the Heroes of the Alamo, the major components of Johnson's plan were complete. In addition to the Great Walk, an Oval Walk using the same patterned pavement surrounded the Capitol. The fencing project included the installation of elaborate gates on all four sides of the grounds. Numerous trees and shrubs were planted by the time the Volunteer Firemen Monument was installed in 1896.

Superintendent of Public Buildings and Grounds Charles Gilbert planted lawns, trees, shrubs and flowers throughout the Capitol Grounds in the early 1900s. Officials installed the Confederated Soldiers Monument in 1903 and two cast-iron spraying fountains set in ornamental concrete pools in 1904. The 1904 Superintendent's Report also noted the construction of an elaborate drinking fountain with an overhead electric light fixture on the east side of the Great Walk at the site of an artesian well. During the course of excavation for a concrete walk around the original well, Superintendent Gilbert found a second well, which was tapped and used to supply a second drinking fountain on the west side of the Great Walk. The west fountain is said to have flowed cold and the east fountain to have flowed warm. Benches were placed along the Great Walk and near the drinking fountains for visitors' comfort.

By 1906, two artificial lakes were listed in an inventory of the Grounds. One was a small grotto with spraying fountains and exotic plants located on the southeast portion of the Ground. The other possibly was a lake surrounded by canna lilies, fern and other shrubs and ornamental trees directly to the west of the Capitol in a depression which still exists today.

In 1907, all of the Grounds' vehicular entrances were widened and the Monument commemorating Terry's Texas Rangers was installed. A year later, a two-gabled greenhouse was installed on the east lawn to provide plants for state buildings and grounds; it later burned in the blizzard of 1925. By 1909, the concrete walkway throughout the Grounds were completed to prevent erosion. A year later, the Monument to Hood's Brigade, the Texas Brigade Army of Northern Virginia, was dedicated. Light fixtures were installed along the Great Walk in the fall of 1915.

The major additions to the Grounds that occurred after 1915 were mostly related to the installation of Monuments. Existing Monuments added after 1915 include the Texas Cowboy (1925, the Statue of Liberty Replica (1951), "The Hiker" honoring veterans of the Spanish American War (1951), the Veterans of the 36th Infantry (1959), the Soldiers of World War I (1961), the Ten Commandments (1961), the Disabled Veterans (1980), Pearl Harbor Veterans (1989), the Texas Pioneer Woman (1998), the Tribute to Texas Children (1998), the Korean War Veterans (1999) and the Texas Peace Officers (1999).

Several early landscape elements were removed after 1915 including the artificial lakes, spraying fountains, original drinking fountains and greenhouse. A granite drinking fountain was placed upon the site of the east drinking

fountain in the 1920 and the Statue of Liberty Monument replaced the west drinking fountain in 1951. A new greenhouse was installed in the 1940s but was later moved to the Texas State Cemetery.

SELF-GUIDED TOUR

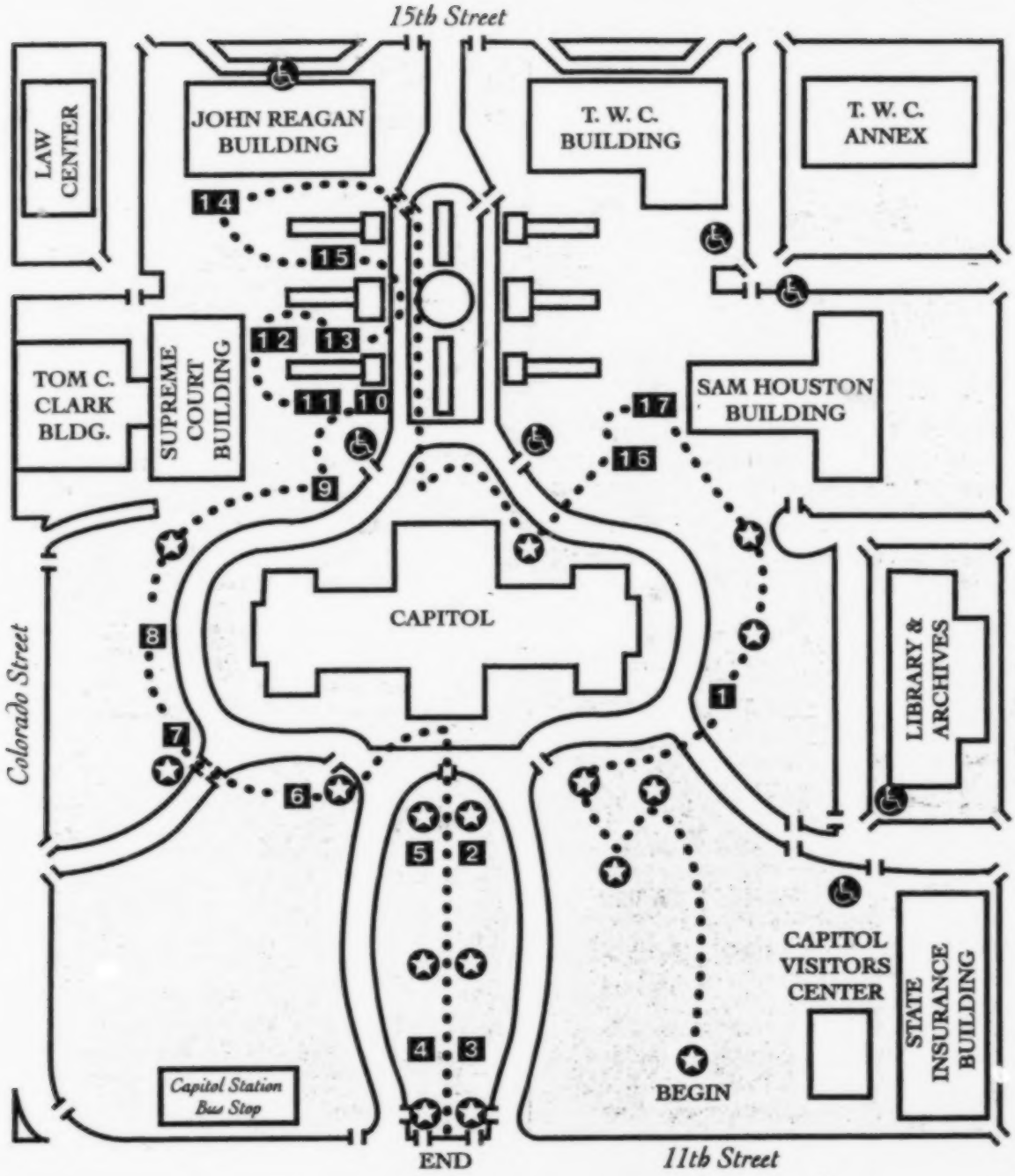
Begin the Grounds tour at the interpretive sign to the west of the 1856-57 General Land Office Building, now the Capitol Visitors Center. Move northwest to the interpretive sign describing the grotto, then to the sign for the Realtor's Fountain, then on up the hill to the ornate reproduction drinking fountain. If you get a drink, think about the one historical feature of the fountain that was not reproduced: originally, a chain dangled down holding a metal cup to be shared by all!

Move toward the Texas State Library and Archives Building, noting the Hood's Brigade Monument **(1)** by artist Pompeo Coppini and then the interpretive sign showing the two-gabled greenhouse. Move toward the pedestrian gate near the Sam Houston Building and pause to study the elaborate perimeter fencing. Mounted on a granite foundation, this wrought- and cast-iron fencing was originally manufactured by Mast, Foos & Company of Ohio. Look closely at the base of the iron gate posts; can you find the brand-name "Buckeye" seal?

Just past the pedestrian gate is a 1928 granite drinking fountain that was moved to this location during the 1990s Grounds restoration project. The second drinking fountain was designed for people who use wheelchairs. Stroll past the Texas Peace Officers Memorial **(17)** and the Monument to Disabled Veterans **(16)** toward the north entrance of the Capitol. Note the granite lying on the ground from

east to west? It marks the original boundary of the historic Capitol Grounds. Rather than replace the iron portion of the fence, officials instead chose to leave only the granite footprint of the historic fenceline so as not to divide the new north Capitol Grounds.

Move south across the drive and Oval Walk to see the top hatch for one of the Capitol's cisterns. Water from the cistern originally was used for drinking, fire protection and hydraulic power for the building's elevators. Travel next to the north entrance of the Capitol and look to the north. Travel approximately 50 feet to the small granite pavers, past the Lady Bird Johnson Texas Capitol Flower Gardens, past the glass panels rising out of the ground to the large circular opening. You are on top of the Capitol Extension, a four-story office building and parking garage! The circle is an open-air rotunda that is very similar to the Capitol's historic interior rotunda. The glass panels are skylights for the Extension which allow natural light to filter down into the building.



MONUMENTS

1. Hood's Brigade
2. Heroes of the Alamo
3. Confederate Soldiers
4. Volunteer Firemen
5. Terry's Texas Rangers
6. Texas Cowboy
7. Spanish-American War
8. Texas National Guard
9. Ten Commandments
10. Tribute to Texas Children
11. Texas Pioneer Woman
12. Statue of Liberty Replica
13. Pearl Harbor Veterans
14. Korean War Veterans
15. Soldiers of World War I
16. Disabled Veterans
17. Texas Peace Officers

Interpretive Signs

Wheelchair Accessibility

Seven monuments are located on the northwest Capitol Grounds. From the open-air rotunda, move toward the John H. Reagan Building. Pause at the Korean War Veterans Memorial **(14)** and the Soldiers of World War I Monument **(15)** before stopping at the small building to the west of the open-air rotunda. This building has elevators that can take visitors down to the Capitol Extension. The four structures to the north and south of the elevators provide emergency exist stairways from the Extension. Travel toward the Pearl Harbor Memorial **(13)** and the Statue of Liberty Replica **(12)** before pausing to enjoy the Tyler Rose Garden. Then continue toward the west Grounds, stopping at the Texas Pioneer Woman Monument **(11)** by artist Linda Sioux Henley, the Tribute to Texas Children Monument **(10)** by artist Larry Ludtke and the Ten Commandments Monument **(9)**.

The Monuments commemorating the Veterans of the 36th Infantry, Texas National Guard **(8)** and the Veterans of the Spanish-American War, "The Hiker" **(7)** are located on the edge of what used to be the west Grounds lake. Crossing the drive, move down the hill to the monument for the Texas Cowboy **(6)** by artist Constance Whitney Warren. Travel back up the hill and toward the south entrance of the Capitol to the round concrete pad inset with a star. Because no photographs of the west drinking fountain have been found to document its appearance, this pad was prepared in anticipation of eventually finding the photographic evidence, reproducing the drinking fountain and installing it here.

Cross the drive and stop at the Great Walk, near the south entrance of the Capitol. At the Capitol's south entrance are two 24-pound howitzer cannon dating to 1836. When facing Congress Avenue, the oldest part of the Capitol

Grounds is in front of you. Period lighting and park benches were reproduced and installed during the 19902 restoration project.

The four oldest Monuments, the Heroes of the Alamo **(2)** by artist J. S. Clark, Terry's Texas Rangers **(5)** by artist Pompeo Coppini, Volunteer Firemen **(4)** by artist Frank Teich and Confederate Soldiers **(3)** by artists Pompeo Coppini and Frank Teich, flank the tree-lined Great Walk. The Heroes of the Alamo Monument features the names of the Texans who lost their lives defending the fort. The Confederate Soldiers Monument shows the 13 states that withdrew from the Union and formed the Confederacy. The names of Texas volunteer firemen who have lost their lives in the line of duty are shown on the Volunteer Firemen Monument. During the Civil War, Benjamin Terry called for volunteers who eventually became the eighth Texas Cavalry for the Confederacy.

Travel halfway down the Great Walk and pause at the two spraying fountains, one of a boy with a fish and the other of a lily plant, in oval pools. Look toward the Capitol. On the south lawn, between where you stand the entrance to the Capitol, once stood the first Capitol on this square, from 1853 until it burned to the ground in 1881. Also note the three cannon nearby. The one farthest north dates to 1865. The two flanking the Great Walk are 12 pounder light field guns from 1864.

Move further down the Great Walk toward Congress Avenue. At the main gate, look toward the south facade of the Texas Capitol. As Senator Temple Houston said on dedication day in May of 1888, "This noble edifice . . . and the features of our civilization are all we can leave our posterity . . . we can at least pass from life's stage with the

proud reflection that we leave behind us . . . a noble edifice than has been bequeathed to us by preceding ages."

A large print, text only version of this brochure is available upon request from the Capitol Information and Guide Service located in the first floor south wing of the Capitol.

EXHIBIT 5

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 52

GENERAL LAND OFFICE BUIDING [sic] OF 1856-57

[SEAL]

The General Land Office Building, constructed in the 1850s, housed the agency responsible for administering the state's vast landholdings. Designed by German architect and Land Office draftsman Christoph Conrad Stremme, it is the oldest surviving state office building. The architecture blends two 19th-century revival styles: the *Rundbogenstil*, or round-arched style, is reflected in the windows and doors; the Norman style is reflected in the castle-like parapets. The exterior walls are limestone rubble, smoothed over with stucco, then scored to simulate cut stone blocks. By 1918, the General Land Office had moved across 11th Street to larger quarters. From 1919 to 1989, the building housed museums operated by the Daughters of the Republic of Texas and the United Daughters of the Confederacy. Following a 1989-92 architectural restoration, the building became the Capitol Complex Visitors Center.

EXHIBIT 6

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 6

GROTTO AND LAGOON

[SEAL]

In conjunction with the City Beautiful Movement that swept the country during the early 20th century, the *Austin Daily Statesman* in 1904 proclaimed, "It is now possible to make luxurious scenery out of a barren waste, and transform a piece of ground which even a farmer would despair into a veritable Garden of Eden." With a newly completed artesian well providing an abundant water supply, a limestone cave-like structure, or grotto, and a goldfish-stocked lagoon with rustic footbridge, central spraying fountain and exotic plants were installed here later in 1904. Initially, the era was lush with hearty water plants and ferns, but by the 1950s it had lost its vitality. Very little evidence of the grotto and lagoon existed by the 1980s.

EXHIBIT 7

BICENTENNIAL FOUNTAIN
1975-1996

[LOGO]

Through a concurrent resolution in April 1975, the 64th Legislature accepted an ornamental water fountain as a gift to the people of Texas from the REALTORS® of Texas (Texas Association of REALTORS®) commemorating the Bicentennial of the Declaration of Independence and the American Revolution. The multi-level, granite fountain stood in this location, and was removed in 1996 when the Restoration of the Historic Grounds project returned the Great Walk vicinity to its 1888-1915 design.

EXHIBIT 8

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 8

ARTESIAN WELL AND EAST DRINKING FOUNTAIN

[SEAL]

The artesian well completed at this site in 1889 furnished an ample and inexpensive water supply for the new Capitol. At a depth of about 1,550 feet, natural pressure forced water from the Trinity aquifer to the surface. The powerful flow of water satisfied drinking, sanitary and fire-protection needs for the Capitol. A coal-fired boiler converted the well water into steam, which turned the building's first electric generator, and circulated through radiators to warm the Capitol's interiors. The abundance of well water for irrigation made possible the first major landscape improvements, including a lawn of sod and more than 100 new trees. A cast-iron drinking fountain, placed over the well in 1903, provided continuously running well water and metal drinking cups hanging from chains. Convinced that the mineralized water possessed medicinal value, visitors hauled it away in bottles for the next 73 years. In 1928, a granite water fountain replaced the cast-iron fixture. Officials closed the well in 1980 due to more stringent water-quality standards. This reproduction fountain, installed in 1996, provides safe drinking water with a gentle step on the foot lever.

EXHIBIT
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A-01-CA-833-H

EXHIBIT 10

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 25

CAPITOL GREENHOUSES

[SEAL]

Four greenhouses have stood on Capitol Square at different periods. Each was designed to cultivate various plants and flowers for use on the grounds of the Capitol, governor's mansion and state cemetery and to provide potted plants and cut flowers to decorate public buildings. Little is known of the first greenhouse, constructed in 1875. The second structure, shown above, was built in 1908, but burned to the ground during the blizzard of 1925. A temporary building functioned as the greenhouse until completion of the fourth Capitol greenhouse about 1941. That structure was removed from the grounds in February 1958.

EXHIBIT 11

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 59

1928 GRANITE WATER FOUNTAIN

[SEAL]

Installed in 1928 over the artesian well, this granite water fountain replaced the circa 1903 cast-iron fountain that once stood east of the Great Walk. Eight spigots on the granite fountain provided abundant access to the mineralized well water, long believed to possess medicinal properties. After more than half a century, the fountain was shut off in 1980 because samples of the artesian water failed to meet more stringent water-quality standards. When the circa 1903 drinking fountain was reproduced and placed above the artesian well site in 1996, the granite fountain was restored, moved here, and connected to the municipal water supply. The light fixture on top was also restored to its original appearance.

EXHIBIT
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EXHIBIT 14

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 56

CISTERNS

[SEAL]

The cistern located below this site is one of two underground brick reservoirs built to store rainwater for use in the Capitol. Although by 1889 an artesian well was supplying an abundance of highly mineralized water, the two cisterns continued to be a source of fresh water until a municipal water supply became available. Rainwater, collected from the Capitol's roof through a system of gutters, filled the cisterns through a series of concealed downspouts and pipes. A coal-fired steam pump in the Capitol's basement distributed the water throughout the building for drinking, sanitary needs and fire protection. The cistern water also filled a large iron tank in the Capitol's attic, to provide power for the original hydraulic elevator. The cistern's top hatch, visible here, provided access for checking the water level and for maintenance.

EXHIBIT
16
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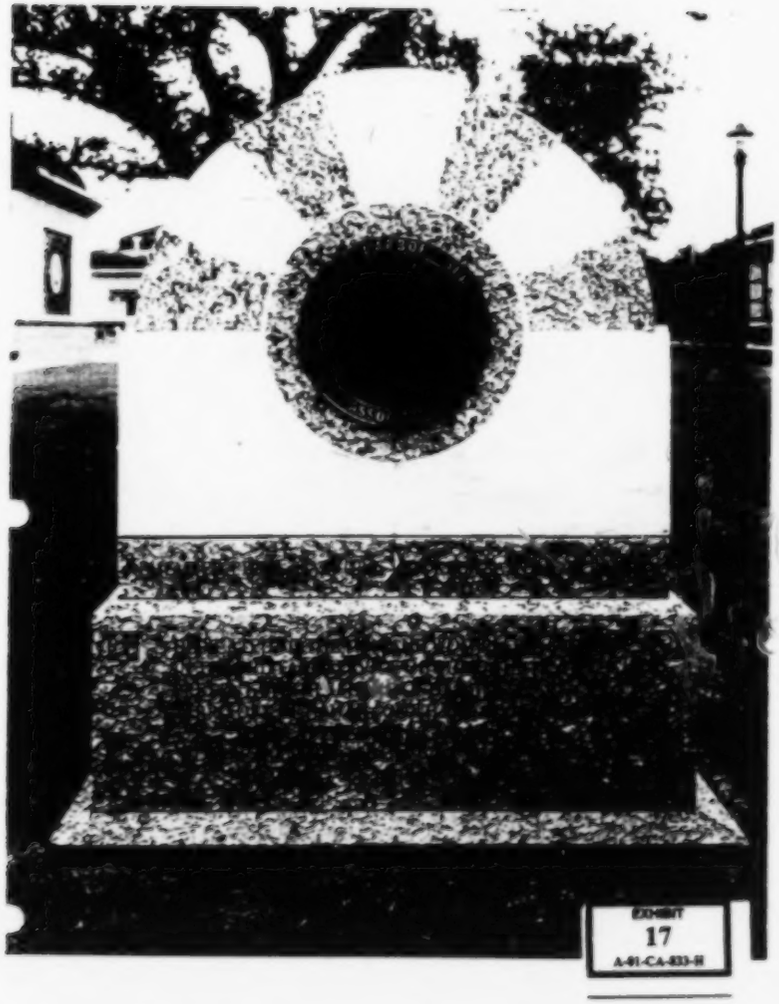
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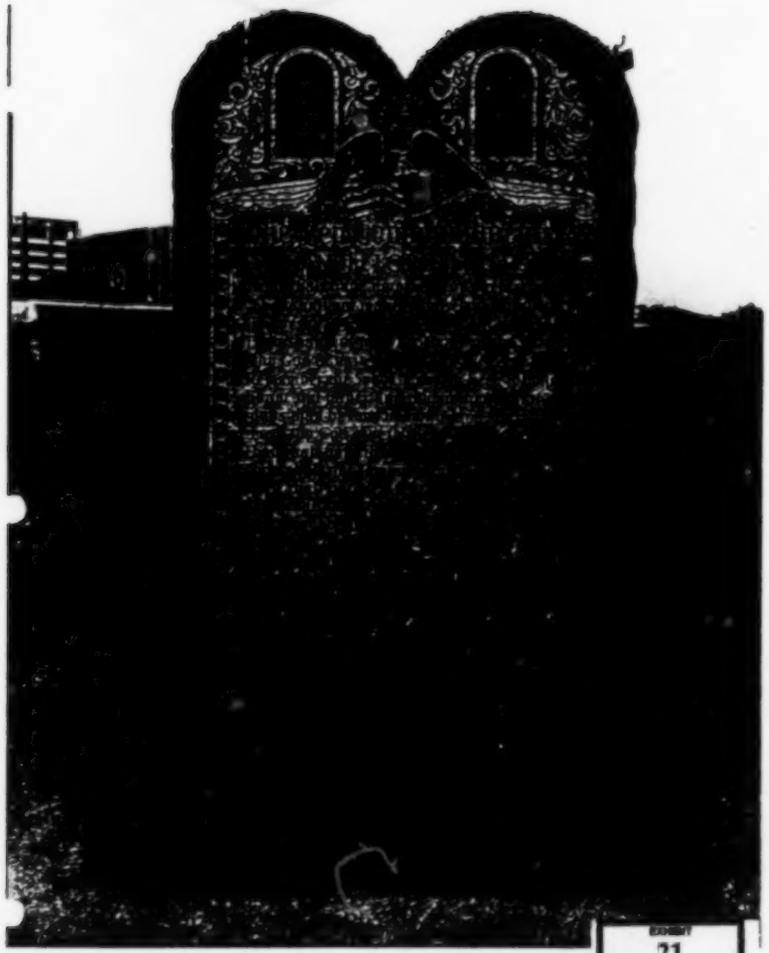

EXHIBIT
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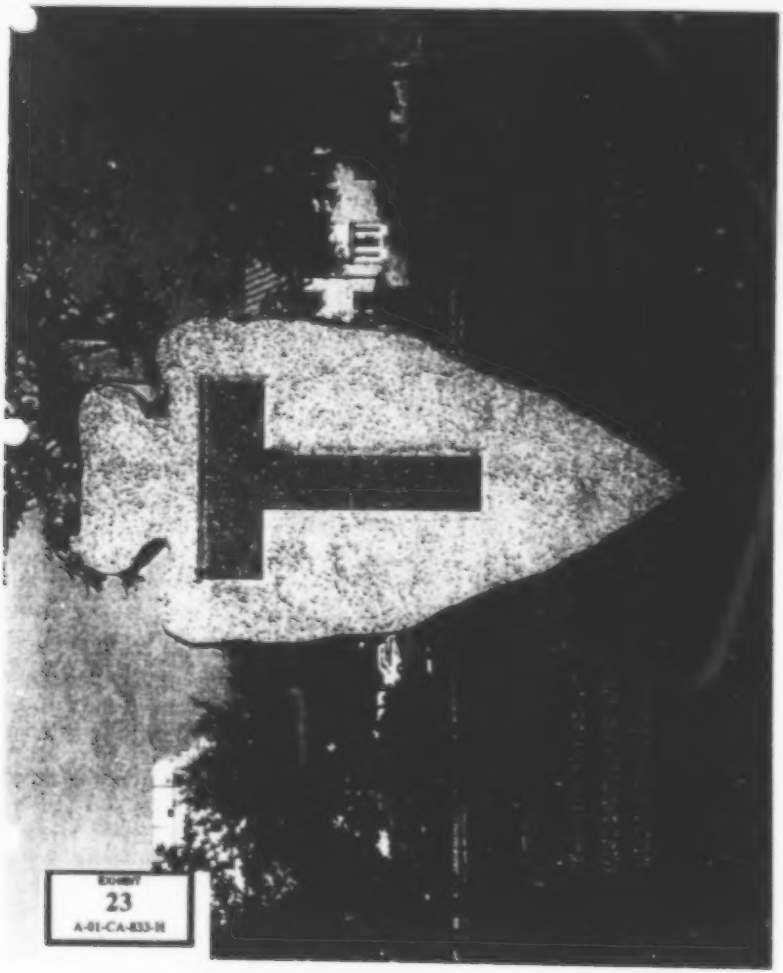
EXHIBIT 22

Bicentennial
Star
1976-1996

[LOGO]

The Austin Lawyers' Auxiliary (previously known as the Austin Lawyers Wives' Club) dedicated a star-shaped landscape monument at this location in 1976 to commemorate the Bicentennial of the Declaration of Independence. The pink granite monument, designed in the shape of the sanctioned Bicentennial Star logo, was removed in connection with the Restoration of the Historic Grounds project, 1996.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A-01-CA-833-H

EXHIBIT 25

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 39

WEST GROUNDS LAKE

[SEAL]

In December 1906, the *Austin Daily Statesman* described the Capitol grounds as " . . . a favorite resort, for young and old, at all seasons, and during the summer months are the scene of nightly concerts that attract the music lover of the city." A small lake occupied the large depression that still exists west of here, at one time supplied by an underground spring in the area. The lake was difficult to maintain and produced hordes of mosquitoes. As then State Gardener J. A. Lott explained, " . . . it was not built right and every rain filled it with mud and trash . . . the pool in fair weather was unsightly with an accumulation of papers," so the lake was drained by 1926.

EXHIBIT 27

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 45

WEST DRINKING FOUNTAIN

[SEAL]

Superintendent of Buildings and Grounds Charles Gilbert installed a drinking fountain at this site in the early 1900s. While excavating for a sidewalk near the 1889 artesian well and first drinking fountain, he found a second artesian well which previously had been capped off, and re-opened it to supply water for this second drinking fountain. The west fountain reportedly flowed cold water, while the east fountain flowed warm. Because no photographs of the west fountain were found to document its appearance, a circular bronze marker was installed in 1996 to mark the location.

EXHIBIT 28

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 46

MONUMENTS OF THE GREAT WALK

[SEAL]

The four earliest monuments placed on the Capitol grounds flank the Great Walk. (1) The granite-and-bronze Alamo Monument, erected in 1891 by the State of Texas, replaced a smaller limestone monument that was destroyed when the 1852 Capitol burned in 1881. (2) The Volunteer Firemen Monument honors volunteer firefighters who have died in Texas in the line of duty. Designed by Frank Teich of San Antonio, it was erected in 1896 by the State Firemen's Association of Texas. In the early 1900s, the monument's tall granite base was shortened and the original granite statue was replaced with a bronze figure, thereby making it consistent with the others on the Great Walk. (3) Sculptor Pompeo Coppini created the bronze statuary for the granite Confederate Monument, commissioned by surviving comrades and unveiled in 1903. (4) Coppini also produced the bronze figure on horseback for the granite Terry's Texas Rangers Monument, erected in 1907 by survivors of the Eighth Texas Cavalry.

EXHIBIT 29

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 10

THE GREAT WALK

[SEAL]

The promenade leading from Congress Avenue to the Capitol's south entrance is called the Great Walk. Completed in 1889, the Great Walk was considered one of the most significant features of the Capitol grounds, formalizing a connection with Austin's most important street. In 1996, the 107-year-old Great Walk was removed due to its deteriorated condition, and replicated. The checkerboard-patterned concrete walk is 25 feet wide and 500 feet long, with rounded limestone curbs. The trees which flank the Great Walk were originally sycamores, although elms and live oaks have also shaded the walk during the 20th century. In 1996, live oaks were planted, and reproductions of the 1907 slat-style, steel park benches were installed. The existing light fixtures along the walk are original; they were installed in 1915 and restored in 1996.

EXHIBIT
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EXHIBIT
31
A-01-CA-833-H

EXHIBIT 32

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 61

CANNONS AND FOUNTAINS

[SEAL]

By the early 20th century, five cannons and two spraying fountains had been installed near the Great Walk. (1) Two, 24-pounder, howitzer cannons presented by Major General Thomas Jefferson Chambers to the Republic of Texas in 1836 were placed at the Capitol's south entrance. (2) Two, 12-pounder, light field guns were displayed on the south lawn. Cast in bronze in 1864, they probably were acquired "to maintain order" by Reconstruction Texas Governor Edmund J. Davis. (3) The fifth cannon is made of wrought iron and dates to 1865. All of the cannons are original, but their wooden carriages have not survived. The cannon carriages on the south lawn were reproduced in metal for durability. (4) Two elaborate cast-iron fountains manufactured by J. W. Fiske of New York were placed in oval pools near the midpoint of the Great Walk in 1904. By the 1940s, the fountains had been removed and the pools converted into flower beds. In 1996, reproduction fountains were installed in reconstructed pools to replicate the original scheme.

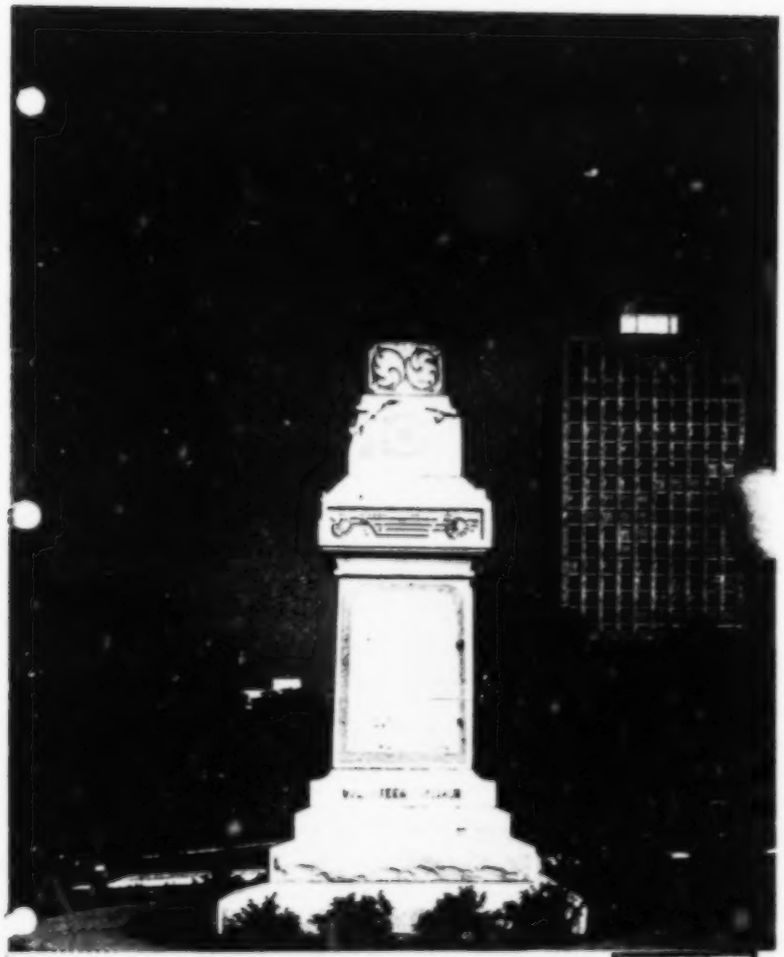
EXHIBIT 33

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 60

CAPITOL OF 1852-53

[SEAL]

Constructed in 1852-53 at an approximate cost of $150,000, this three-story limestone structure was the second Capitol in Austin, but the first statehouse to be built on Capitol Square. Situated within the 56-square-block townsite surveyed by Edwin Waller in 1839, Capitol Square was linked to the Colorado River by Congress Avenue. Located directly south of the current site of the Texas Capitol, the Greek-Revival-style building measured 140 feet by 90 feet. Master builder Abner Cook supplied the interior woodwork for the structure. The 1850s Capitol was completely destroyed by fire in November 1881. An investigating committee concluded that the fire resulted from a faulty stove pipe connection.



EXHIBIT
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A-01-CA-833-II

EXHIBIT 35

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 50

CAPITOL FENCE

[SEAL]

William Munro Johnson, hired in 1888 to plan the Capitol's landscaping, designed ornate iron fencing with a granite foundation to demarcate the perimeter of the grounds. The wrought- and cast-iron fencing, manufactured by Mast, Foos & Company of Ohio, uniquely features Texas' Lone Star motif. Incorporating iron gates at the five carriage- and six pedestrian-entrances, the fence also functioned to keep wandering livestock off Capitol Square. In 1907, the vehicular entrances were widened, and the gates removed and dispersed to several Austin locations. In 1996, the fence was completely reconditioned, with new pedestrian entrances added to improve access. Also it was painted in its original black and gold colors, although metallic paint was used instead of gold leaf. Several of the original gates were restored and returned to the grounds; the remainder were reproduced from the originals.

EXHIBIT 36

SIGN TYPE EXT-03 BRONZE CAST PLAQUES ITEM 51

CAPITOL GROUNDS DESIGN

[SEAL]

Soon after completion of the Capitol in May 1888, the Capitol Board hired prominent Dallas civil engineer, William Munro Johnson, to design the landscaping of the grounds. His plan called for symmetrical, but curving, stone-edgd carriage drives An allée flanking a black-and-white diamond-patterned south walk was centered in a large oval. Sloping lawns, variegated tree and shrubbery plantings, and a decorative iron fence on a stone base completed his design. No copy of the map detailing Johnson's plan has survived. However, a 1900 University of Texas thesis included a map of the grounds as they existed at that time, documenting the implementation of Johnson's basic scheme.

EXHIBIT
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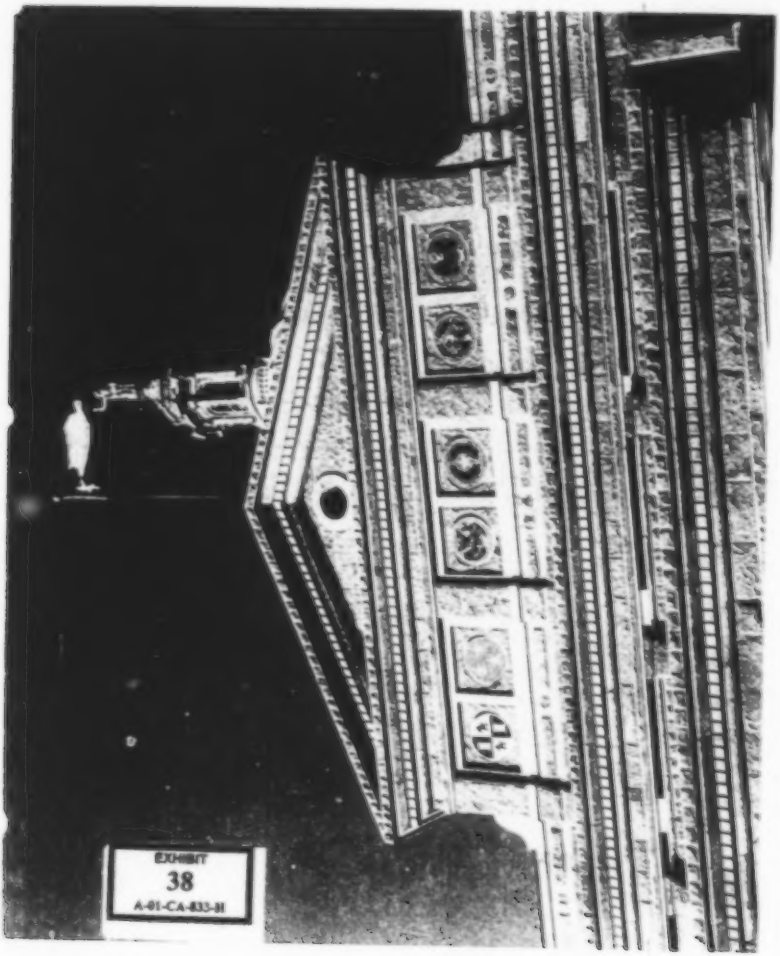
EXHIBIT
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Proprietary Purchase Justification

Stasswender Memorials
SPB Contract No. 96-015
$23,100.00

This contract covers the replacement of the Six Seal Medallions to the North Pediment of the Texas Capitol. This work is being done in compliance with House Bill No. 1, as passed by the 74th Legislature, specifically documented in Article 1-78; rider number 8.

Stasswender Memorials is the monument source for the Six Seal Medallions and originally placed the seals on the North and South Pediments of the Capitol Building in 1976. Stasswender Memorials also replaced the seals to the South Pediment in August of 1995. They are thoroughly familiar with the materials to be used and the techniques required. Using this vendor will ensure that the Six Seal Medallions are restored accurately and in a timely manner.

Requested by: Date:

/s/ Charlynn Doering 3/25/96
Charlynn Doering
Assistant Director

Authorized by: Date:

/s/ Rick Crawford 3/25/96
Rick Crawford
Executive Director

SUPPLEMENT TO HOUSE JOURNAL
Seventy-fourth Legislature, Regular Session

Text of Conference Committee Report
House Bill No. 1
(General Appropriations Act)

and

Governor's Veto Proclamation

(SEAL)

STATE OF TEXAS
1995

* * *

PENSION REVIEW BOARD
(Continued)

Number of Positions (FTE)	5.0	5.0
Schedule of Exempt Positions and Per Diem of Board Members		
Executive Director, Group 1	$47,786	$47,786
Per diem of Board Members	1,400	2,420

1. **Public Retirement System Database**. To the extent feasible within the appropriations above, it is the intent of the Legislature that the State Pension Review Board develop and maintain a database, which is accessible by modem or some form of electronic bulletin board that addresses the informational needs of public retirement systems and other regular users of pension related data. This information should identify the names and addresses of the public retirement systems, including but not limited to the results of financial reports and actuarial valuations, and any other pertinent information the Pension Review Board deems appropriate.

PRESERVATION BOARD

	For the Years Ending August 31, 1996	August 31, 1997
A. Goal: PRESERVE CAPITAL BLDGS To preserve, maintain, and restore the State Capitol, the General Land Office Building, the Capitol Extension, their contents and the grounds, and convey their historical importance to Capitol visitors.		
Outcomes:		
Percent of Follow-up Compliance Reports Filed Based on the State Preservation Board Facilities Management Plan	100%	100%
Percent of Planned and Funded Work Completed for the Historic South Capitol Grounds Restoration	100%	100%
Percentage Increase in Inventoried Historical Items From the 1994 Level	80%	87%
Percent of Collection Documentation Completed	80%	87%
Percent Restoration Completed of the Collection	2%	3%
Annual Percentage Change in the Number of Tours Booked	50%	33%
Percentage of the Capitol Complex Visitors Center Available Touring Hours Utilized Annually By the Public	38%	50%
A.1.1. Strategy: BUILDING MODIFICATIONS Utilize Master Plan to review	$ 242,150	$ 252,650

and authorize modifications to the buildings and their grounds.		
Outputs:		
Number of Building Modification Requests Reviewed	50	
A.1.2 Strategy: MANAGE CAPITOL & GROUNDS	$ 105,850	$ 86,850
Manage the Master Plan restoration projects for the Capitol and Capitol Grounds.		
Outputs:		
Number of Master Plan Capitol and Capitol Grounds-related Projects Completed Within Time Line Projections	3	
A.2.1 Strategy: HISTORICAL RESTORATIONS	$ 228,250	$ 220,750
Acquire, document and restore historical items.		
Outputs:		
Number of Items Documented or Updated	75	75
A.3.1 Strategy: EDUCATIONAL PROGRAM	$ 325,750	$ 344,250
Manage a comprehensive educational program focusing on the history and restoration of the Capitol Complex buildings and their grounds for visitors to the Capitol and the Capitol Complex Visitors Center		

Outputs:		
Number of Events, Exhibits, and Special Activities Scheduled and Managed	780	1,040
A.3.2 Strategy: OPERATIONAL ACTIVITIES	$ 91,139	$ 85,139
Oversee the events, exhibits, and activities conducted in areas under State Preservation board control and operate a profitable gift shop.		
Outputs:		
Number of Events, Exhibits, and Special Activities Scheduled and Managed	200	200
Total, Grand A: PRESERVE CAPITAL BLDGS	$ 993,139	$ 989,639
Grand Total, PRESERVATION BOARD	$ 993,139	$ 986,639
Method of Financing:		
General Revenue Fund	$ 990,139	$ 986,639
General Revenue Fund-Consolidated	3,000	3,000
Total, Method of Financing	$ 993,193	$ 989,639
Number of Positions (FTE)	31.0	30.5
Schedule of Exempt Positions		
Executive Director, Group 2	$ 68,959	$ 68,958

1. **Building Repair Funding.** The State Preservation Board is hereby appropriated $400,000 per annum for emergency repairs and required modifications to the Capitol, the Capitol Extension, and The 1857 General Land Office building. This authority is contingent upon prior notification to the Legislative Budget Board, Governor's

Office of Budget and Planning, and Comptroller's Office on any planned expenditures of these funds.

2. **Appropriation: Capitol Fund.** The donated and earned balances remaining in the Capitol Fund as of August 31, 1995, and deposited into the Capitol Fund during the current biennium, are hereby appropriated to the State Preservation board for use by the Board for the benefit of the Capitol and the associated programs of the agency in accordance with the intentions of the donors and the Legislature.

3. **Unexpended Balance Authority: Capitol Restoration:** All unexpended balances from the Restoration and Repair of the Capitol are hereby reappropriated to the State Preservation Board for the biennium beginning September 1, 1995. These funds shall be used to pay all outstanding construction claims. Any unencumbered balance, after payment of claims, may b [sic] spent to complete the Historic Capitol Grounds Project. Any excess funds remaining after completion of the Historic Capitol Project shall be transferred to the Preservation Trust Fund administered by the Historical Commission.

4. **Appropriation: Fee Revenue.** All other fees and revenues collected or earned pursuant to V.T.C.S., Government Code 443.007 are appropriated to the State Preservation Board for the purposes specified within the Act.

5. **Sunset Contingency.** Funds appropriated above for fiscal year 1997 for the Preservation Board are made contingent on the continuation of the Preservation Board by the Legislature. In the event the agency is not continued, the funds appropriated for fiscal year 1996 or as much thereof as

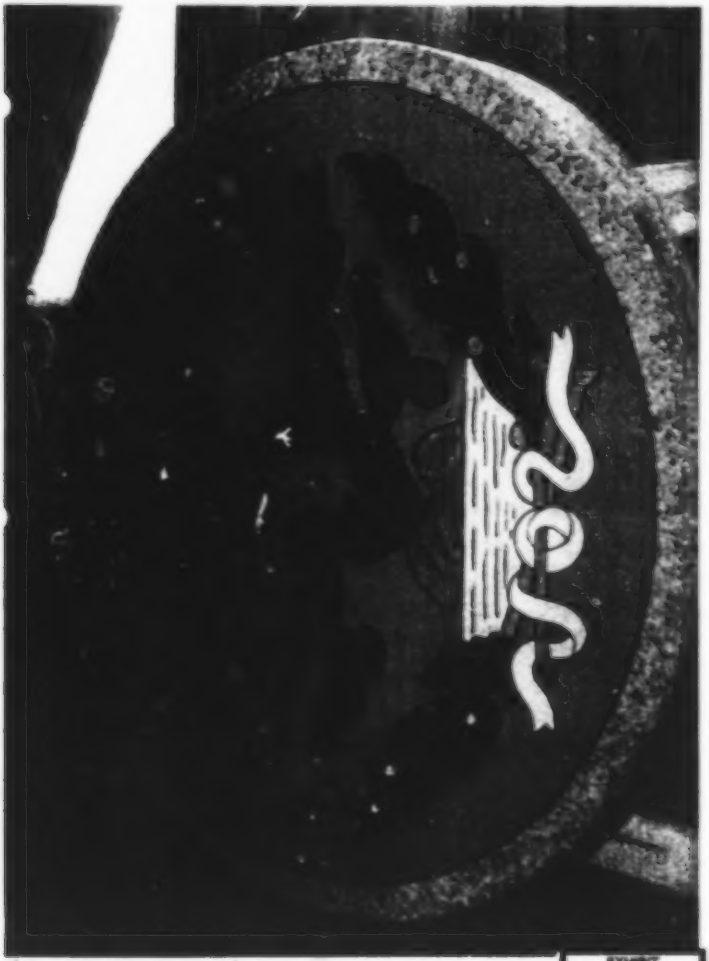
may be necessary are to be used to provide for the phase out of agency operations.

6. **Maintaining Paved Surfaces of Capitol Grounds.** Notwithstanding any other provision in law, the Texas Department of Transportation shall demolish, construct, repair, and maintain paved surfaces on the State Capitol Grounds according to the Historic Capitol Grounds Master Plan adopted by the State Preservation Board.

7. **Placement of Portraits in the Capitol Rotunda.** It is the intent of the Legislature that portraits of Texas governors displayed in the Capitol rotunda be placed with the governor serving the last term located on the first floor of the rotunda. The remaining portraits shall be displayed in reverse chronological order.

8. **Return of Six Seals to the Entrance of the Capitol.** It is the intent of the Legislature that the six seals affixed to the front and back of the State Capitol removed during the Capitol restoration project be restored and returned.

9. **Appropriation: Restriction on Appropriated Funds.** None of the funds appropriated to the Preservation Board may be expend d by the Board for the 1996-97 biennium unless and until an office locking system approved by the Speaker Pro Tem of the House of Representatives has been installed in the Speaker Pro Tem's office located in the Capitol Building.



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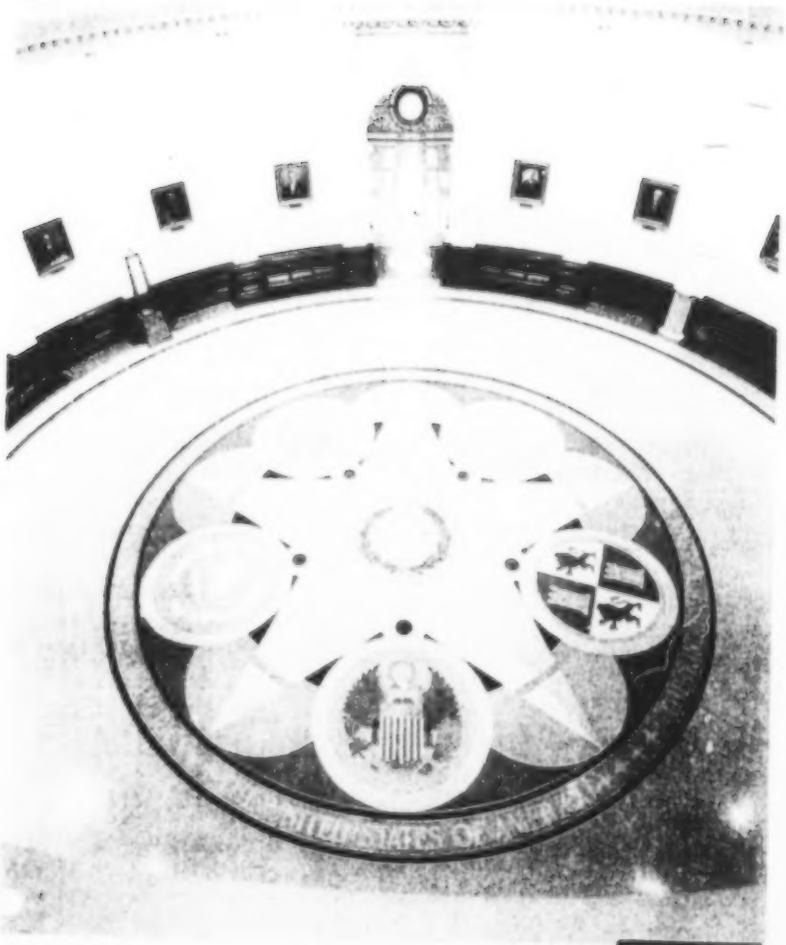

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The Rotunda

The Rotunda is one of the most impressive areas of the Capitol. The seals on the rotunda floor represent the six sovereign nations that have governed all or part of Texas. It is not necessary to discuss information about the elements on the seals. It is included in case you get questions.

The Spanish seal features symbols of castles and lions which represent the union of the two Spanish kingdoms of Aragon and Castile. Spanish explorers arrived in what is now called Texas in 1519 and claimed the area which included not only what is now Texas but also land that is now part of Colorado, New Mexico, Arizona, Oklahoma, and Nebraska. The Spanish hoped to find gold and wealth, especially the legendary Seven Cities of Cibola. After the French tried to establish Texas settlements, Spain began to try in earnest to establish missions and settlements in Texas. They attempted to convert the Native-American Indians to Catholicism, however, they had less success in Texas than they had in Mexico where the Mayan and Aztec Indians had already established cities and temples before the Spanish arrived and had a more centralized civilization.

The French seal features the fleur-de-lis, the ancient symbol of the Bourbon kings. France established a colony at Matagorda Bay in 1685. When Spain found out that France was starting a settlement in Texas, they accelerated their efforts to settle Texas since Spain and France were rivals in their attempts to colonize this part of the Americas. However, France later abandoned its settlement efforts in Texas. Their colony was decimated by disease, Indian attacks, lack of supplies, and eventually mutiny.

They later established colonies in what became Louisiana where they were much more successful.

The Mexican seal features the Aztec legend concerning the location of a future capital. Mexico gained its independence from Spain in 1821, with Texas forming a part of the new Mexican republic. Moses Austin, an American from Missouri and the father of Stephen F. Austin, had obtained a grant from the Spanish government in January 1821 to settle 300 families on a large tract of land in the southeast part of Texas between the Brazos and Colorado Rivers. However, he died in June of 1821, leaving the work to Stephen. Stephen reluctantly took on the task when he discovered he would have to deal with the new Mexican government. In order to get the Mexican government to approve the colonization program, Austin spent a year in Mexico City lobbying for his colonial authorization. An excellent negotiator and statesman, in January of 1823, the Mexican congress signed an agreement that offered heads of families "a league and a labor" of land (4,605 acres) and other inducements and provided for the employment of agents, called empresarios, to promote immigration. The empresarios received large tracts of land after fulfilling their quota of settlers. Austin was a very successful empresario.

Santa Anna and his government became concerned about the tendency of the Anglo-American settlers to identify with the U.S. instead of Mexico, and they passed new laws which seemed oppressive to the settlers. As the government became more centralized and less democratic, many of the settlers became unhappy with Mexican rule, which was a factor leading to the Texas Revolution.

The seal of the Republic of Texas features the lone star encircled by traditional symbols of strength (live oak branch) and peace (olive branch). Directly over the star and 218 feet above, is another star on the ceiling of the rotunda. That star is eight feet in diameter.

Texas won its independence from Mexico in 1836. Texas is known as the Lone Star State although the origin of the phrase is unknown. (The majority of the early settlers were from the United States where each state is represented by a star and the phrase perhaps evolved from that.) The early Texans received help in their struggle for independence in the form of ammunition, guns, and men from various states in the United States and several other countries.

The U.S. seal commemorates the thirteen original states with 13 stripes in the seal, 13 stars, 13 arrows, and 13 leaves on the olive branch. Texas was an independent Republic for approximately ten years, from 1836 to 1846. It had its own money, its own Navy, and established diplomatic relations with France, Britain, the Netherlands, and the United States of America. Texas is the only independent republic that became a part of the United States. When Texas joined the United States in 1846, it became the 28th state in the union. It retained the title to its public lands, but also had to keep its large public debt. In the Compromise of 1850, however, the debt was forgiven by the United States when Texas released its claim to what is now parts of Oklahoma, New Mexico, Kansas, Colorado, and Wyoming.

The Confederate seal features George Washington on horseback. Of course Washington was long dead at the time of the formation of the Confederacy, he was from

Virginia and his wife's granddaughter was married to Robert E. Lee, the Commander of the Confederate forces. His figure is encircled by the cash crops of the south; corn, cotton, wheat, and tobacco. The phrase is Latin, meaning loosely, "God will judge." Although the majority of Texans were in favor of joining the Confederacy in the 19th century, some were not. The most prominent of these was the governor, Sam Houston who was removed from office when he would not approve of secession from the Union. On February 23, 1861, Texas became one of the eleven southern states that seceded from the Union. The Civil War was over in April of 1865. Texas was not readmitted to the Union until March of 1870, after it had complied with various provisions prescribed by the federal government.

Although Native Americans did not have a flag or seal, they were Texas' earliest residents and were living and fighting in Texas even after the Civil War. The warfare on the Texas plains ended after a battle between the U.S. Army and Indians at Palo Duro Canyon in the fall of 1874 in the Texas panhandle.

People from many other foreign countries came to Texas to live, but they came as settlers and expected to become citizens of the new state. The largest groups came from Germany, but people came from many other European countries. In more recent times, settlers have come from all over the world, including the Asian countries.

Portraits of former presidents of the Republic of Texas and former governors and provisional governors of the state of Texas line the Rotunda walls on all floors. They are arranged in chronological order with the most recent on the first floor. No governor's portrait is painted until the governor has left office. Governor Richards was the second

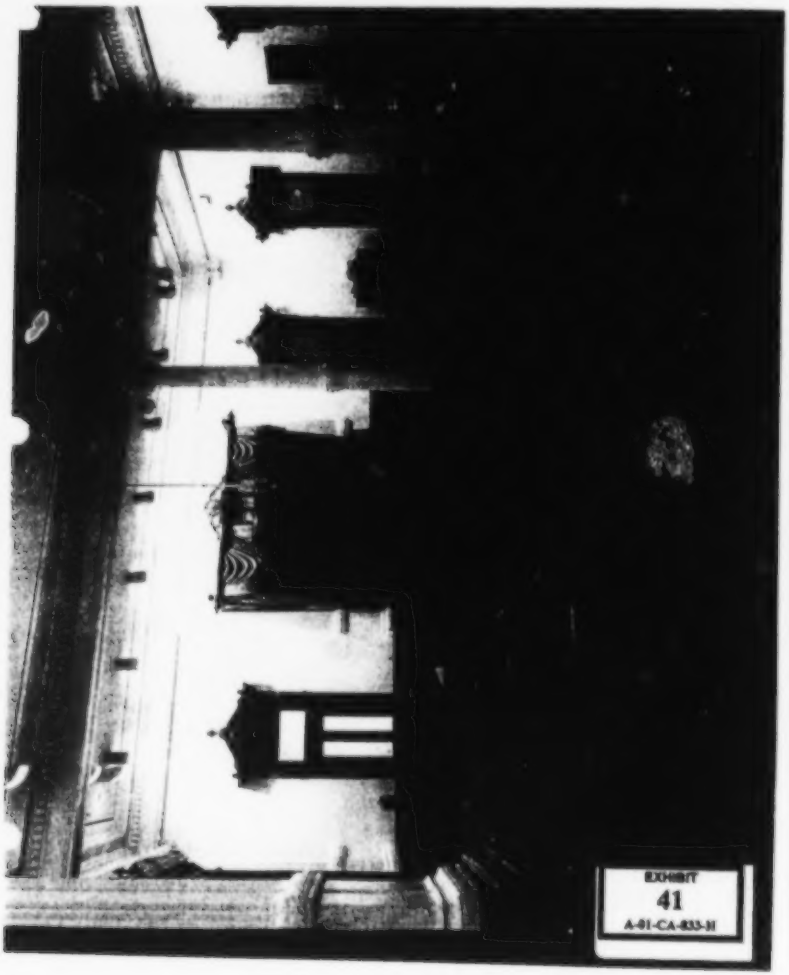
woman to be governor of Texas. The first woman to be governor was Miriam Ferguson, wife of former governor, James Ferguson, the only governor to be impeached. James Ferguson served as governor from 1915-1917 and was succeeded by the Lt. Governor, William P. Hobby, who became governor when Ferguson was impeached. Hobby was later elected to another term. He was the father William Pettus Hobby, Jr., Texas' former lieutenant governor. James and Miriam Ferguson were known to Texans as "Ma and Pa" Ferguson and Miriam campaigned in 1924 on the slogan "Two governors for the price of one!" Miriam Ferguson was elected governor in 1924 and again in 1932. She served a two year term each time. (Four year terms were established in 1974.) The rotunda also has a marble bust of Miriam Ferguson by artist Enrico Cerracchio on display.

The present governor of Texas is George W. Bush. He is from Arlington and is the son of former president, George Bush.

Special Note

Groundbreaking ceremonies for the Capitol were held on February 1, 1882. The cornerstone,

* * *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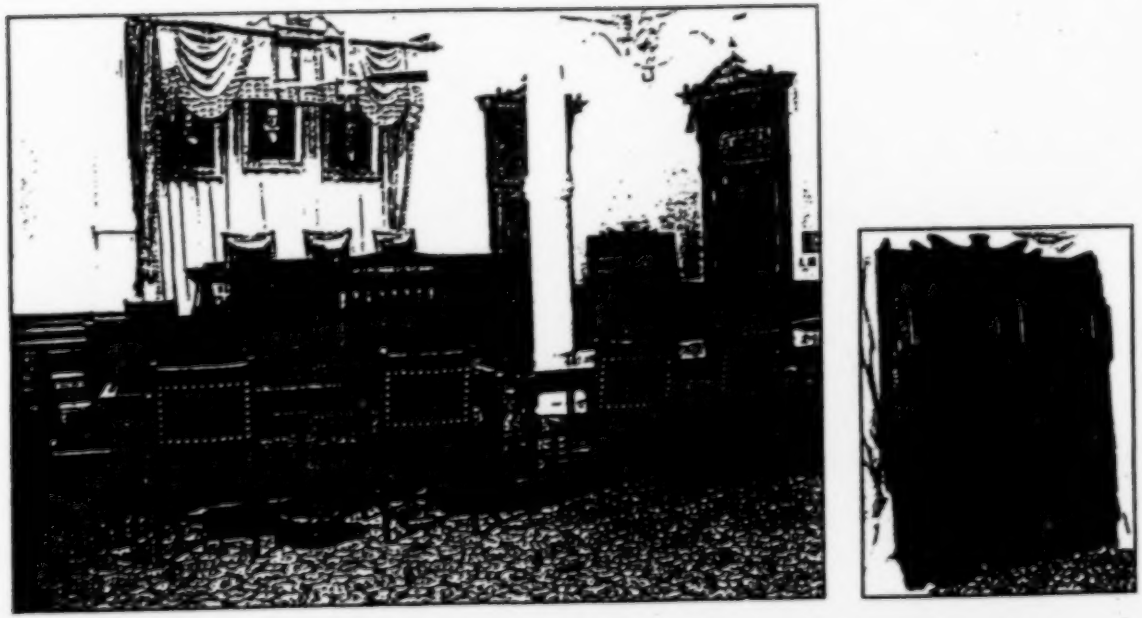
HISTORIC SUPREME COURT COURTROOM IN THE TEXAS CAPITOL

The historic Supreme Court Courtroom in the Capitol, c. 1905.



The restored historic Supreme Court Courtroom in the Capitol. The walnut desk with the inscription " Sicut Patribus. Sit Deus Nobis" that is in front of the drapery was the Capitol's largest and most elaborate piece of furniture when purchased in 1888. The Latin inscription on it literally translated says "Just as to our fathers, may God be to us.". A transcript case, pictured in the lower right corner, was reproduced from historical photographs.

BEST AVAILABLE COPY

EXHIBIT 42

The Great Seal of the United States

United States Department of State
Bureau of Public Affairs

September 1906

The Great Seal
of the United States

Before it adjourned on July 4, 1776, the Continental Congress of the newly independent United States passed a resolution:

> Resolved, that Dr. Franklin, Mr. J. Adams and Mr. Jefferson, be a committee, to bring in a device for a seal for the United States of America.

Thus, three of the five men who had drafted the Declaration of Independence were brought together in further service to their country. The revolutionaries needed an emblem and national coat of arms to give visible evidence of a sovereign nation and a free people with high aspirations and grand hopes for the future. The task proved far more difficult than anticipated; it took six years, two more committees, and the combined efforts of 14 men before the Great Seal of the United States became a reality on June 20, 1782.

Portrait artist Du Simitiere's design for Franklin, Adams, and Jefferson suggested shield, Eye of Providence in radiant triangle, and motto, *E Pluribus Unum*, all used in final design. Drawn from original in Thomas Jefferson papers.

The First Committee

The challenge facing the committee was to translate intangible principles and ideals into graphic symbols. Three of the best minds of the Age of Enlightenment – Franklin, Adams, and Jefferson – struggled unsuccessfully with Biblical and classical themes, including the Children of Israel in the Wilderness and the Judgement of Hercules. Finally they sought the help of a talented "drawer" and portrait artist, Pierre Eugene du Simitiere. To the post of consultant, Du Simitiere brought some knowledge of heraldry – the art of describing coats of arms – and also experience in designing seals.

Four features recommended by the first committee and its consultant were later adopted in the final seal: the Eye of Providence and the date of independence (MDCCLXXVI), both of which appeared on the final reverse side of the seal, and the shield and Latin motto, *E Pluribus Unum* (Out of many, one), on the obverse side. The first committee submitted its design on August 20,

1776, but the Congress ordered the report "to lie on the table," indicating lack of approval.

The Second Committee

In March 1780, the Congress turned the design and final report of the first committee over to a new committee, composed of James Lovell, John Morin Scott, and William Churchill Houston. They asked Francis Hopkinson, the gifted Philadelphian who had designed the American flag and the great seal of the State of New Jersey, to serve as their consultant. They too failed to create an acceptable seal, but, influenced by the flag adopted in 1777, they contributed to the final design 13 red and white stripes, the constellation of 13 six-pointed stars, and the olive branch, a symbol of peace.

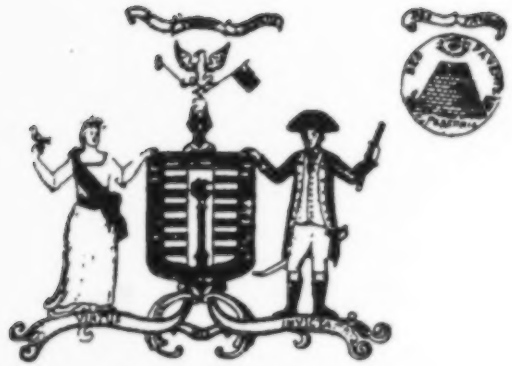
Second committee's consultant, Francis Hopkinson, contributed red, white, and blue colors to shield, an arrow and olive branch, and radiant constellation of 13 stars.

Great Seal Origins

Great seals have their origins in the royal seals of the 7th, 8th, and 9th centuries, but the first seal to be called "great" was that of England's King John (1199-1216). The King's Chamber acquired a smaller seal of its own called the "privy seal," for use in the sovereign's private business, and thereafter the King's seal became known as the "Great Seal." The U.S. seal is called "Great Seal" although no "lesser" seal exists.

The Third Committee

In May 1782 the Congress appointed a third committee. The three members John Rutledge, Arthur Middleton, and Elias Boudinot – did little or no serious work themselves, relying on the services of William Barton of Philadelphia. A young lawyer with artistic skill and well versed in heraldry, he became a central figure in the seal's refinement. Barton's chief contribution at this stage was the eagle, not the American bald eagle, but a small crested white eagle "displayed" (with its wings spread). He combined it with a small flag and a design for the reverse which contained a 13-step unfinished pyramid and the first committee's Eye of Providence. He quickly drew up two designs and their technical explanations, and the committee turned in its report five days after it was appointed.



Lawyer William Barton's design for third committee combined white eagle, flag, and reverse side with 13-step pyramid and first committee's Eye of Providence.

Charles Thomson's Proposal

The Congress still was not satisfied. On June 13, 1782, it presented the collected work and recommendations of the three committees to Charles Thomson, Secretary of Congress. Thomson was not an artist, but he was a practical man with the ability to get things done. He selected the best features of all the previous designs, assigning prominence to the eagle. Feeling that the new nation's symbol should be strictly American, however, Thomson replaced Barton's crested Imperial eagle with the native American bald eagle, wings extending downward as though in flight. He placed in the left talon a bundle of arrows and in the right, the olive branch.

Thomson's modified crest (a device placed above the shield) was a constellation of 13 stars surrounded by clouds. The shield, borne on the eagle's breast, was a

chevron design with alternating red and white stripes. Adopting the motto *E Pluribus Unum* from the first committee's report, Thomson included it on a scroll clenched in the eagle's beak. His was the first proposal in which the final design of the obverse can be seen.

In his design of the seal's reverse, Thomson retained the pyramid with the Eye of Providence in a triangle at the zenith and, as products of his Latin scholarship, introduced the mottos *Annuit Coeptis* (He [God] has favored our undertakings) over the eye and *Novus Ordo Seclorum* (A new order of the ages) beneath the pyramid. He gave his rough sketches and reports to Barton, depending on him to polish the designs.

Secretary of Congress Charles Thomson united earlier suggestions, gave them fresh and novel arrangement, pleasing in its simplicity and lack of clutter. His design was first to foreshadow one Congress adopted.

Charles Thomson's "Remarks and Explanation," Adopted by the Continental Congress, June 20, 1782

"The Escutcheon is composed of the chief [upper part of shield] & pale [perpendicular band], the two most honorable ordinaries [figures of heraldry]. The Pieces, paly [alternating pales], represent the several states all joined in one solid compact entire, supporting a Chief, which unites the whole & represents Congress. The Motto alludes to this union. The pales in the arms are kept closely united by the Chief and the Chief depends on that

union & the strength resulting from it for its support, to denote the Confederacy of the United States of America & the preservation of their union through Congress.

"The colours of the pales are those used in the flag of the United States of America; White signifies purity and innocence, Red, hardiness & valour, and Blue, the colour of the Chief signifies vigilance, perseverance & justice. The Olive branch and arrows denote the power of peace & war which is exclusively vested in Congress. The Constellation denotes a new State taking its place and rank among other sovereign powers. The Escutcheon is born on the breast of an American Eagle without any other supporters [figures represented as holding up the shield] to denote that the United States of America ought to rely on their own Virtue

"Reverse. The pyramid signifies Strength and Duration: The Eye over it & the Motto allude to the many signal interpositions of providence in favour of the American cause. The date underneath is that of the Declaration of Independence and the words under It signify the beginning of the New American Æra, which commences from that date."

The Final "Device"

Barton portrayed the eagle with its wings displayed, but with wing tips upward, and simplified Thomson's chevron arrangement of stripes on the shield. He arranged 13 vertical stripes, alternately white and red, below a rectangular blue "chief" (upper part of the shield). And he specified that the arrows in the eagle's left talon should number 13.

The designs were returned to Thomson on June 19, 1782. He made a few alterations and overnight produced the "blazon" (written description) with accompanying "Remarks and Explanation" and presented them to the

Continental Congress on June 20. The Congress acted the same day to adopt the report, which did not contain a drawing of either design.

Thus, nearly six years after establishment of the first committee, Charles Thomson and William Barton "brought in a device." The Great Seal of the United States was unique simple and uncluttered, yet bold – the composite product of many minds.

Meaning of the Seal

Symbolically, the seal reflects the beliefs and values that the Founding Fathers attached to the new nation and wished to pass on to their descendants. The report which Thomson submitted to the Congress explained the obverse this way: The red and white stripes of the shield "represent the several states . . . supporting a [blue] Chief which unites the whole and represents Congress." The colors are adopted from the American flag: "White signifies purity and innocence, Red, hardiness & valour, and Blue, the colour of the Chief, signifies vigilance, perseverance & justice." The shield, or escutcheon, is "born on the breast of an American Eagle without any other supporters to denote that the United States of America ought to rely on their own Virtue."

The number 13, denoting the 13 original States, is represented in the bundle of arrows, the stripes of the shield, and the stars of the constellation. The olive branch and the arrows "denote the power of peace & war." The constellation of stars symbolizes a new nation taking its place among other sovereign states. The motto *E Pluribus Unum,* emblazoned across the scroll and clenched in the eagle's beak, expresses the union of the 13 States. Recent scholarship has

pointed out the probable source of this motto: *Gentlemen's Magazine,* published in London from 1732 to 1922, was widely read by the educated in the American Colonies. Its title page carried that same motto and it is quite possible that it influenced the creators of the seal.

The reverse, sometimes referred to as the spiritual side of the seal, contains the 13-step pyramid with the year 1776 in Roman numerals on the base. At the summit of the pyramid is the Eye of Providence in a triangle surrounded by a Glory (rays of light) and above it appears the motto *Annuit Coeptis.* Along the lower circumference of the design appear the words *Novus Ordo Seclorum,* heralding the beginning of the new American era in 1776.

* * *

The Great Seal of the United States

Obverse Side of the Great Seal

The most prominent feature is the American bald eagle supporting the shield, or escutcheon, which is composed of 13 red and white stripes, representing the original States, and a blue top which unites the shield and represents Congress. The motto, *E Pluribus Unum* (Out of many, one), alludes to this union. The olive branch and 13 arrows denote the power of peace and war, which is exclusively vested in Congress. The constellation of stars denotes a new State taking its place and rank among other sovereign powers (see next pages).

Reverse Side of the Great Seal

The pyramid signifies strength and duration: The eye over it and the motto, *Annuit Coeptis* (He [God] has favored

our undertakings), allude to the many interventions of Providence In favor of the American cause. The date underneath is that of the Declaration of Independence and the words under it, *Novas Ordo Seclorur* (A new order of the ages), signify the beginning of the new American era in 1776 (see next pages).

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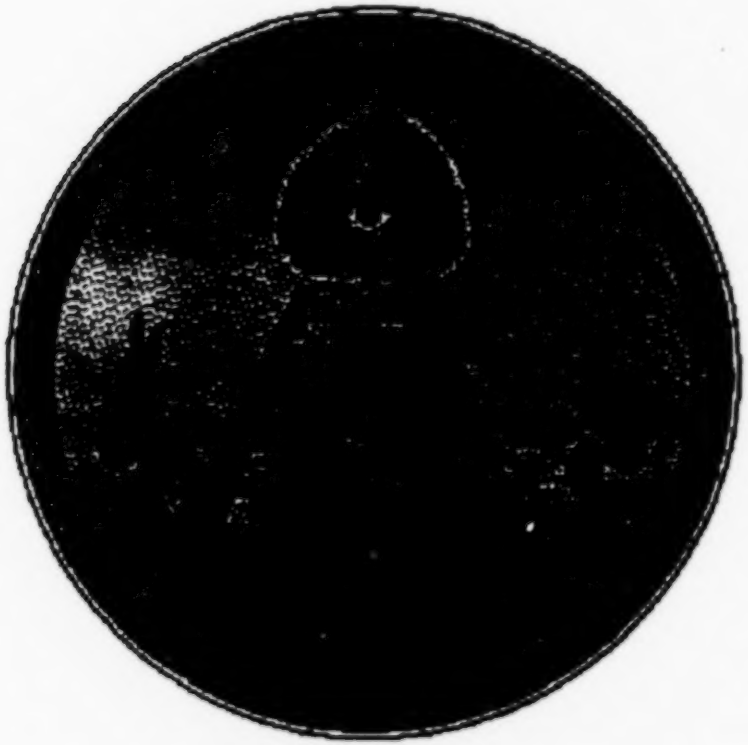


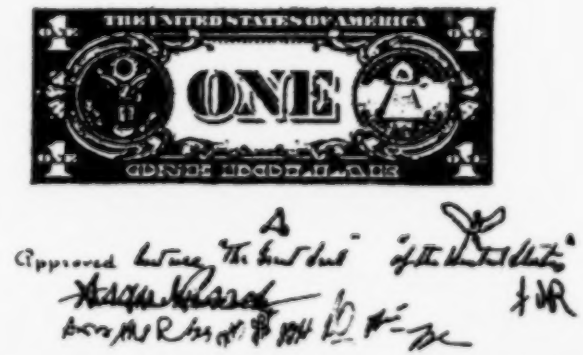
Reverse Side of the Great Seal

* * *

pointments Staff. At present it is impressed on the following types of documents, after they have been signed by the President and countersigned by the Secretary of State:

- Instruments of ratification of treaties and other international agreements;
- Proclamations of treaties and other international instruments;
- Appointment commissions of ambassadors, Foreign Service officers, Cabinet officers, and all other civil officers appointed by the President whose commissions are not required by law to issue under another seal; and
- Assignment commissions for consular officers.

The seal is also affixed to the envelopes that contain letters accrediting and recalling our ambassadors and other ceremonial communications from the President to heads of foreign governments.



Model of back of 1935 dollar bill submitted to President Franklin Roosevelt for approval. The President changed his mind after approving it, reversed placement of obverse and reverse and added legend "The Great Seal of the United States" in two parts under his roughly sketched pyramid and eagle.

* * *

Publication No. 10411 • Published by the United States Department of State • Bureau of Public Affairs • Office of Public Communication • Washington, DC • September 1996

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

First Great Seal Committee – July 1776

"E Pluribus Unum"

Late on the afternoon of July 4, 1776, the Continental Congress appointed Benjamin Franklin, Thomas Jefferson, and John Adams to "to bring in a device for a seal for the United States of America."

Just three days earlier, the colonial delegates in Philadelphia had learned that a hundred British ships were sighted off the coast of New York – the first of 400.

Although these distinguished committee members were among the ablest minds in the new nation, they had little knowledge of heraldry and were not really qualified to compose a suitable design. Therefore, to help translate their vision, they chose the artist Pierre Euge'ne Du Simitière to work with them.

A talented portrait artist, this remarkable man had many skills and interests; most importantly, he knew something of heraldry and had experience in designing seals. The four men consulted among themselves between July 4 and

August 13, and each one brought before the committee a proposal for the Great Seal.

Franklin's proposal is preserved in a note of his own handwriting:

> "Moses standing on the Shore, and extending his Hand over the Sea, thereby causing the same to overwhelm Pharaoh who is sitting in an open Chariot, a Crown on his Head and a Sword in his Hand. Rays from a Pillar of Fire in the Clouds reaching to Moses, to express that he acts by Command of the Deity.
>
> "Motto, Rebellion to Tyrants is Obedience to God."

Adams chose the allegorical picture known as the "Choice" or "Judgment of Hercules" as engraved by Simon Gribelin, an image that deeply impressed Adams. According to the editors of the Adams Family Correspondence:

> The original fable is attributed to Xenophon in his Memoirs of Socrates, which narrates a debate, or rather a succession of appeals to the young Hercules, by female impersonations of Virtue and Vice (Pleasure). Vice speaks first and points out the flowery path of self-indulgence; Virtue follows and adjures Hercules to ascend the rugged, uphill way of duty to others and honor to himself.

Jefferson also suggested allegorical scenes. For the front of the seal: children of Israel in the wilderness, led by a cloud by day and a pillar of fire by night. For the reverse: Hengist and Horsa, the two brothers who were the legendary leaders of the first Anglo-Saxon settlers in Britain.

Du Simitière's sketch of his proposal:

Pierre Du Simitière was a curious character. As a talented artist skilled in heraldry, he designed the state seals of Delaware, Georgia, and Virginia. As an avid collector of all things American, he started the first American museum. This sketch is part of the Library of Congress U.S. Capitol Exhibit, "A More Perfect Union: Symbolizing the National Union of States."

First committee's choice for the Great Seal

On August 20th, the committee made its report: A shield with emblems of the six European cultures that migrated to America: three for Britain (English rose, Scottish thistle, Irish harp) and three for continental Europe (French fleur-de-lis, German eagle, Belgic lion).

Supporting the shield: the Goddess of Liberty, who holds a spear and wears the Phrygian cap, and the Goddess of Justice with her balance.

Crest "The Eye of Providence in a radiant Triangle whose Glory extends over the Shield and beyond the Figures."

Motto "E PLURIBUS UNUM."

This first committee's choice for the reverse was basically Jefferson's revision of Franklin's proposal:

"Pharaoh sitting in an open Chariot, a Crown on his head and a Sword in his hand, passing through the divided Waters of the Red Sea in Pursuit of the Israelites: Rays from a Pillar of Fire in the Cloud, expressive of the divine Presence and Command, beaming on Moses who stands on the shore and extending his hand over the Sea causes it to overwhelm Pharaoh.

"Motto: **Rebellion to Tyrants is Obedience to God."**

Symbolic elements from the first committee incorporated into the final Great Seal design:

Shield
The motto E pluribus unum on a scroll
Eye in a triangle surrounded with a glory
Cloud
MDCCLXXVI
(A "German Eagle" was introduced as a minor element.)

The World of Franklin & Jefferson" – poster from the 1976 exhibit by Charles & Ray Eames for the American Revolution Bicentennial Administration.

CHURCH SYMBOLISM

AN EXPLANATION
OF THE MORE IMPORTANT SYMBOLS OF THE OLD AND NEW TESTAMENT, THE PRIMITIVE, THE MEDIAEVAL AND THE MODERN CHURCH

F. R. WEBBER

INTRODUCTION BY
RALPH ADAMS CRAM
LITT.D., LL.D., F.A.I.A., A.N.A., F. R. G. S.

SECOND EDITION, REVISED

CLEVELAND
J. H. JANSEN, PUBLISHER
MCMXXXVIII

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CHAPTER VII.

THE SACRED MONOGRAMS

SEVERAL groups of letters have been used from the days of the primitive Christian Church onward, to symbolize our Lord Jesus Christ. In popular language, these are known as sacred monograms, although several of them might properly be called abbreviations.

DERIVATION OF THE "IC XC"

The Chi Rho Symbol. This is among the most ancient of the so-called monograms of our Lord Jesus Christ. It is the abbreviation of the word "Christ." This name of our Saviour was spelled XPICTOC in ancient Greek uncials, the letter C having been used instead of the letter Sigma more familiar in our day. Taking the first two letters of this word XPICTOC, the abbreviation XP was the result. This is called Chi Rho, from the names of the Greek letters X and P. A horizontal line over the two letters is the sign of an abbreviation.

Countless examples of the Chi Rho symbol exist in the catacombs, as well as on early coins, lamps, pottery and other objects brought to light by the archaeologist. Entire books have been written upon the subject.

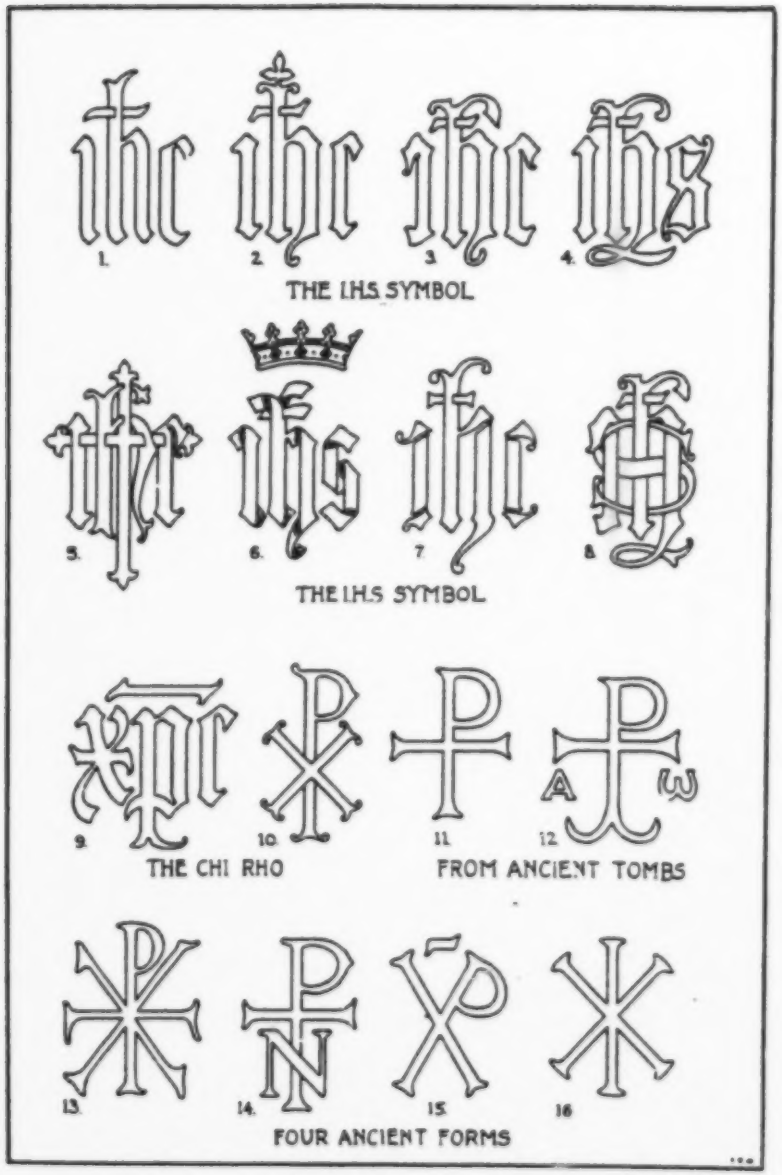
On Plate IX we show a few of the more familiar forms, some of which are rather crude in their original ancient form, others beautifully made. We show them in their slightly modernized form, as used today in Christian art. Figures 10 and 11 are very common on early burial inscriptions, lamps and coins. Figure 12, from the catacombs, combines the Alpha and Omega with the Chi Rho, signifying that our Lord Jesus is the beginning and end of all things. Figure 13, also from the catacombs, combines a true Chi Rho with the Greek Cross. Figure 14 contains the letter N, meaning *Nika*, or "Jesus the Conqueror," or "Jesus Conquers."

JESUS CHRIST
THE VICTOR

Some authorities believe that is a combination of the Greek Chi Rho and the Latin word *Noster*, and that it means "Our Christ." Figure 15 shows an ancient form of the Chi Rho with the Rho placed upon one arm of the letter Chi. Figure 16 is another variation, made by combining the first letter of the Greek word IHCOYC, meaning "Jesus," and the word XPICTOC, meaning "Christ." Another form of this same symbol is shown on Plate VIII, Figure 28. Still another form, combined with the Greek cross, is shown on Plate VIII, No. 29.

The IHC Symbol. Even more popular today, but not quite so ancient as the Chi Rho symbol, is the IHC. This is the abbreviation of the Greek word IHCOYC, meaning "Jesus." Often it is written IHS or even I. H. S. The form IHS is not so good as the ancient IHC, which is historic-

* * *



Sacred Monograms PLATE IX

Magen David

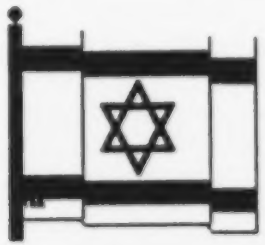
The Magen David (shield of David, or as it is more commonly known, the Star of David) is the symbol most commonly associated with Judaism today, but it is actually a relatively new Jewish symbol. It is supposed to represent the shape of King David's shield (or perhaps the emblem on it), but there is really no support for that claim in any early rabbinic literature. In fact, the symbol is so rare in early Jewish literature and artwork that art dealers suspect forgery if they find the symbol in early works.

Scholars such as Franz Rosenzweig have attributed deep theological significance to the symbol. For example, some note that the top triangle strives upward, toward G-d, while the lower triangle strives downward, toward the real world. Some note that the intertwining makes the triangles inseparable, like the Jewish people. Some say that the three sides represent the three types of Jews: Kohanim, Levites and Israel. Some note that there are actually 12 sides (3 exterior and 3 interior on each triangle), representing the 12 tribes. While these theories are theologically interesting, they have little basis in historical fact.

The symbol of intertwined equilateral triangles is a common one in the Middle East and North Africa, and is thought to bring good luck. It appears occasionally in early Jewish artwork, but never as an exclusively Jewish symbol. The nearest thing to an "official" Jewish symbol at the time was the menorah.

In the middle ages, Jews often were required to wear badges to identify themselves as Jews, much as they were in Nazi Germany, but these Jewish badges were not always the familiar Magen David. For example, a fifteenth century painting by Nuno Goncalves features a rabbi wearing a six-pointed badge that looks more or less like an asterisk.

In the 17th century, it became a popular practice to put Magen Davids on the outside of synagogues, to identify them as Jewish houses of worship in much the same way that a cross identified a Christian house of worship; however, I have never seen any explanation of why this symbol was chosen, rather than some other symbol.



The Magen David gained popularity as a symbol of Judaism when it was adopted as the emblem of the Zionist movement in 1897, but the symbol continued to be controversial for many years afterward. When the modern state

of Israel was founded, there was much debate over whether this symbol should be used on the flag.

Today, the Magen David is a universally recognized symbol of Jewry. It appears on the flag of the state of Israel, and the Israeli equivalent of the Red Cross is known as the Red Magen David.

Chai

This symbol, commonly seen on necklaces and other jewelry and ornaments, is simply the Hebrew word Chai (living), with the two Hebrew letters Chet and Yod attached to each other. Some say it refers to the Living G-d. Judaism as a religion is very focused on life, and the word chai has great significance. The typical Jewish toast is l'chayim (to life). Gifts to charity are routinely given in multiples of 18 (the numeric value of the word Chai).

Hamesh Hand

The hamesh hand or hamsa hand is a popular motif in Jewish jewelry. Go into any Jewish gift shop and you will find necklaces and bracelets bearing this inverted hand with thumb and pinky pointing outward. The design commonly has an eye in the center of the hand or various Jewish letters in the middle.

There is nothing exclusively Jewish about the hamesh hand. Arab cultures often refer to it as the Hand of Fatima, which represents the Hand of G-d. Similar designs are common in many cultures. Why it has become such a popular symbol among Jews? I haven't been able to find an adequate explanation anywhere. My best guess: in many cultures, this hand pattern represents a protection against the evil eye, and the evil eye has historically been a popular superstition among Jews.

For some lovely illustrations of Jewish variations on this design, see: Chaim Peretz Vitrage

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Judaism 101

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Welcome!

Welcome to Judaism 101! Judaism 101 is an online encyclopedia of Judaism, covering Jewish beliefs, people, places, things, language, scripture, holidays, practices and customs. My goal is to make freely available a wide variety of basic, general information about Judaism, written from a traditional perspective in plain English. This web site is constantly growing, with new information added every few weeks.

Everything in this web site is free to use or distribute in any way, with three conditions: 1) if you use text, graphics or sound from this site, please credit this site; 2) do not redistribute this information for profit; 3) do not "mirror" this site or copy pages from this site for use on other web sites. For further details, please see my copyright page.

The information in this site is written predominantly from the Orthodox viewpoint, because I believe that is the starting point for any inquiry into Judaism. As recently as 200 years ago, this was the only Judaism, and it still is the only Judaism in many parts of the world. Be aware, however, that many Jews do not follow all of the traditions

described here, or in the precise form described here. The Conservative movement believes that these laws and traditions can change to suit the times, and Reform/Liberal/Progressive movements believe that individuals can make choices about what traditions to follow. However, what I present here is the starting point, the traditions that are being changed or chosen. On some pages, I have identified variations in practice or belief in other movements.

About the Author

This site is created, written and maintained by Tracey Rich. I do not claim to be a rabbi or an expert on Judaism; I'm just a traditional, observant Jew who has put in a lot of research. I work as the Education Director for Legal-Edge Software, a company that develops, markets and supports case management software for lawyers. I am also the co-author of several legal reference texts, including Pennsylvania Damages; Personal Injury Verdicts and Settlements. I am a member of Congregation Or Shalom, a Conservative synagogue in Chester County, PA.

Awards

ANAHATA: LOTUS OF THE HEART

By Anodea Judith

The six-pointed star, made of two interlacing equilateral triangles, is the central image within the lotus of the heart chakra. The appearance of this symbol within the astrological configuration of January 23, 1997 may have much significance in terms of socio-cultural planetary changes occurring at this time. The following is a further explanation of the chakras, their evolutionary significance, and the meaning of the heart chakra in particular.

The ancient system of seven energy centers located within the body, called CHAKRAS, describes a comprehensive metaphysical system that encompasses varying levels of consciousness, human behavior, colors, sounds, vibrational qualities, and the progression of socio-cultural evolution.

The seven chakras form a continuum from matter to consciousness, earth to heaven, and body to mind that connects our mundane physical selves to our higher nature, without negating either. Each step upward includes and builds upon the level below it. Each step downward is an act of creation, concretizing our ideas on the physical plane.

The chakras are further associated with elements which symbolize their basic essence: (from bottom to top) earth, water, fire, air, sound, light and thought. Psychologically, the chakras are oriented to basic human life issues (again from bottom to top): survival, sex, power, love, communication, vision, and understanding.

The heart chakra is the middle chakra in a system of seven. It symbolizes the two polarities of body and spirit as interpenetrating in perfect balance. The upward

pointing triangle symbolizes matter rising into spirit. The downward triangle (similar to the ancient female symbol for birth) represents spirit descending into manifestation. To fully open the heart chakra we need to bring into balance the various aspects of our existence, such as male and female, light and shadow, mind and body, practicality and spirituality.

It is my belief that the dawning Age of Aquarius heralds a socio-cultural age corresponding to the heart chakra. This era marks the importance of balancing the polarities of human existence within the dominating paradigm of the collective conscious.

But first let us look briefly at the pattern of cultural evolution through the chakras that has occurred thus far:

The period of the Paleolithic cave dwellers relates to the consciousness level of chakra one. Here we were bound without recourse by the cycles of the earth. Tribes roamed across the earth, lived in caves made of earth. We hunted and gathered, taking what the earth freely offered. Worship was of a monotheistic mother goddess, who symbolized the miracle of birth and the fecundity of earth. The beginning of this age is hard to fathom – perhaps it had no true beginning, but is grounded in the survival instincts of the animal kingdom from which we have all emerged.

The dawn of the age of chakra two, (element water, oriented to sexuality and procreation) coinciding with the astrological age of Cancer (a cardinal water sign) was marked by the agricultural revolution and the beginning of ship building and travel by water, circa 10-8,000 BCE. Control of water through irrigation allowed communities to settle in one place rather than nomadically migrate across the land, and this new found freedom created a

giant leap in cultural creativity. There were cities with thousands of citizens; great temples were built, with a proliferation of art and ritual, and written language toward the end of this period. Archeaologists believe it to have been a period of relative peace and prosperity. Worship was of a polytheistic variety of nature gods, male and female, oriented toward the agricultural cycles (planting and reaping) and the life/death/rebirth cycle of human lives.

The age of the third chakra (element fire, oriented to power and energy) coincides with the astrological age of Aries (a cardinal fire sign), about 1500 BCE. At this time patriarchal forces controlled culture through warlike aggression and hierarchical domination, and with but few exceptions overthrew the peaceful agrarian communities that preceded them. With fire, we could forge metals, make tools, and make weapons. The male Sky Gods replaced the earth and vegetation deities, with the worship turning toward the sun, the storm (lightning), and war gods. The collective struggle of existence was oriented toward power and technology. Technology freed us up from survival demands one step further, allowing populations to continue to grow, with greater diversification of labor as well as class status. Patterns of domination and persecution created the need for both personal and collective power which played out in individuals, villages, cities, and countries. These patterns have persisted through the present day, with huge nation states, ever increasing technology, and simultaneous increase in "sophisticated" weaponry, such as nuclear warheads.

We have been in the latter parts of the third chakra stage through this century. Issues of power and domination, energy and control are central concerns on our planet. We

are technologically advanced, but our technology is also destroying the earth. Energy resources are a premium issue in power dynamics, such as the Persian Gulf War fought essentially over oil reserves. Much is out of balance, with the mind favored over the body, technology favored over ecology, white over black, male over female.

The age of the heart chakra is an age where these archetypal elements come into balance. Here the warring agressive [sic] drives begin to wane and peace and ecological balance become the predominant concerns. Balance between the sexes, between races, and within the Self through our conscious and unconscious, active and passive, spiritual and material aspects of our existence, are also elements of the heart chakra's general orientation toward equilibrium. Increased focus on spirituality, with a simultaneous honoring of the body and the earth, is an example of this interpenetrating balance that is emerging today through New Age movements, therapeutic trends in psychology, and popular literature. As the heart chakra corresponds to the element air, so too does the sign of Aquarius, which is also dawning at this time, both in 97 (Jan 23 is the cusp of Aquarius) and as a larger era.

The actual moment that a new age begins is difficult if not impossible to pinpoint. These are larger cultural shifts that take place globally through many different activities, cultures and events over a broad span of time. Yet we are now, for the first time, conscious enough to see the patterns that emerge and watch for signposts that herald significant turning points. I believe the astrological configuration of January 23, 1997 is just one of those important signposts.

Monument Guide: *Texas Heroes*

THE TEN COMMANDMENTS
Erected 1961 by the Fraternal Order of Eagles of Texas.

Hewn from Texas "Sunset Red" granite in the traditional shape of the biblical stones and inscribed with the Ten Commandments, the monument was presented to the people of Texas.

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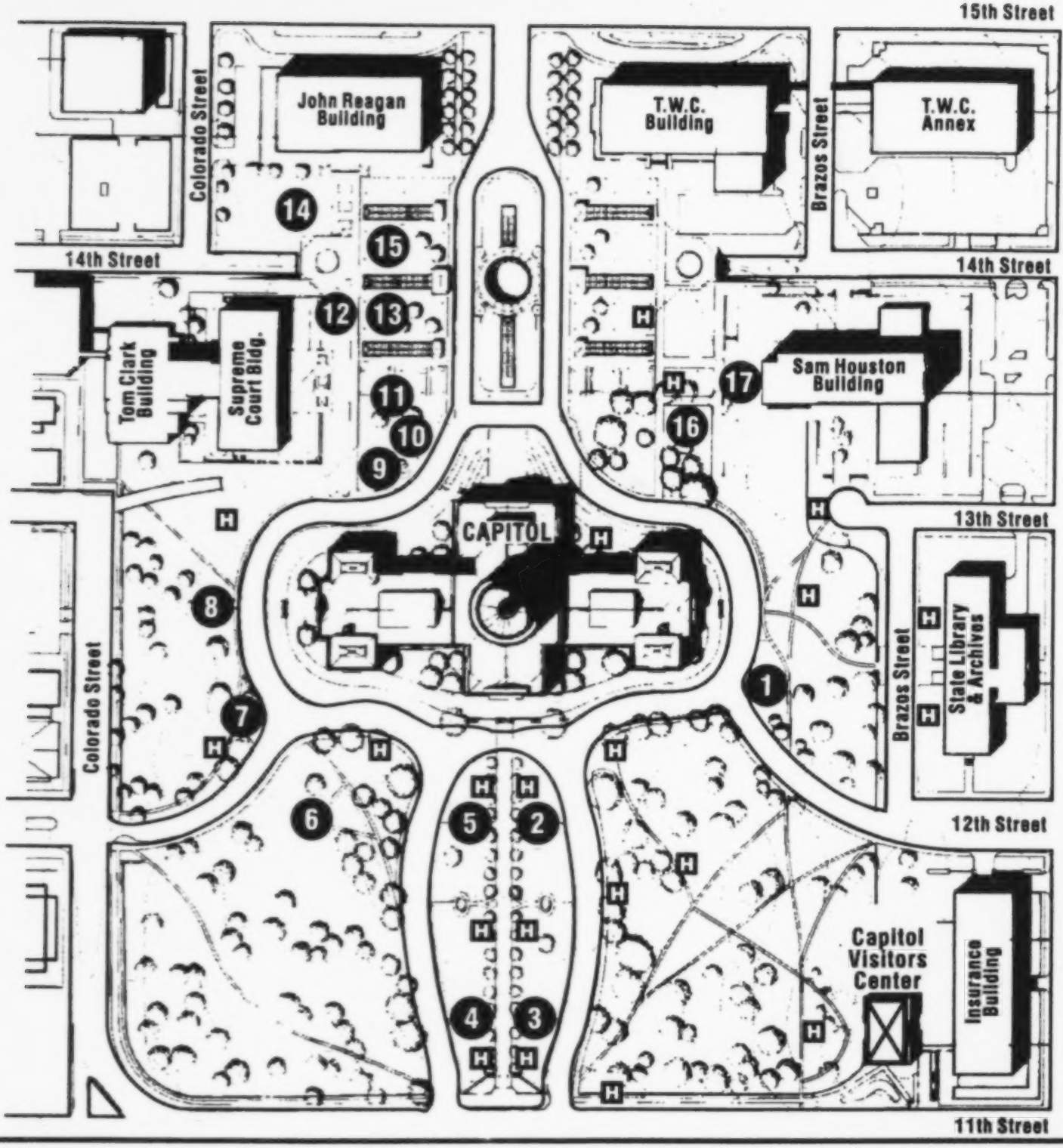

1. Hood's Brigade
2. Heroes of the Alamo
3. Confederate Soldiers
4. Volunteer Firemen
5. Terry's Texas Rangers
6. Texas Cowboy
7. "The Hiker"
8. 36th Infantry
9. Ten Commandments
10. Tribute to Texas Children
11. Texas Pioneer Woman
12. Statue of Liberty Replica
13. Pearl Harbor Veterans
14. Korean War Veterans
15. Soldiers of World War I
16. Disabled Veterans
17. Texas Peace Officers

H = Historical Marker

CAPITOL MONUMENT GUIDE

NORTH

NOTE: The diagram above has been simplified for clarity and does not accurately reflect all details of the actual grounds.

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TEXAS CAPITOL MONUMENT GUIDE

1. **HOOD'S TEXAS BRIGADE** – Erected 1910 by surviving comrades and friends.
   A gray granite shaft, with hand-carved quotes by President Jefferson Davis, General Robert E. Lee, and others, is topped by the bronze figure of a Confederate soldier. The monument stands as a memorial to the members of John B. Hood's Texas Brigade Army of Northern Virginia. Principal battles, during which some 4000 soldiers in the division died defending the South throughout the Civil War, are listed on the base. The bronze figure was executed by Pompeo Coppini.

2. **HEROES OF THE ALAMO** – Erected 1891 by the State of Texas.
   A bronze statue of a Texan holding a muzzle-loader rifle stands atop a Texas Sunset Red granite base. In 1836, during a 13 day siege, about 187 Texans under the command of William B. Travis, lost their lives defending the Alamo fort against Mexican General Santa Anna's army of more than 5000. Names of the Texans who died in the battle, including James Bowie and David Crockett, are inscribed upon the four granite supports. Monument designed by J. S. Clark.

3. **CONFEDERATE SOLDIERS** – Unveiled 1903 by surviving comrades.
   Five bronze figures on a gray granite base represent the Infantry, Cavalry, Artillery, and Navy, headed by the Confederate president, Jefferson Davis. Etched in the base are the 13 states which withdrew from the Union and formed the Southern Confederacy, as well as the battles fought between 1861 and 1865. The bronze figures were executed by Pompeo Coppini. Monument erected by Frank Teich.

4. **VOLUNTEER FIREMEN** – Erected 1896 by the State Firemen's Association of Texas.
A bronze figure of a fireman carries a frightened child in his left arm and a lantern in his right. On the granite base are inscribed names of those Texan volunteers who have lost their lives fighting fires.

5. **TERRY'S TEXAS RANGERS** – Erected 1907 by surviving comrades.
The bronze statue, by Pompeo Coppini, portrays one of Terry's Texas Rangers astride a spirited horse. In 1861, during the Civil War, Terry's Texas Rangers were mustered at Houston after Benjamin Terry and Thomas Lubbock's call for volunteers. Ten companies of 100 men each were formally activated as the 8th Texas Calvary, and during the following five years participated in many engagements defending the Southern Confederacy.

6. **TEXAS COWBOY** – Erected in 1925.
The bronze statue was presented to the State of Texas, "native home of the Cowboy," by the notable American sculptor Constance Whitney Warren. It represents the artists portrayal of a typical Texas cowboy riding a rearing horse, and is a tribute to the "rough and romantic riders of the range."

7. **"THE HIKER"** – Erected 1951 by the Spanish-American War Veterans and Auxiliaries of Texas.
The bronze statue of a soldier, mounted on a Texas Sunset Red granite pedestal, honors the memory of all the Veterans of the Spanish-American War (1891-1902). It was executed by the Gorham Company of Providence, Rhode Island.

8. **VETERANS OF THE 36th INFANTRY** – Erected 1959.
Hewn of Texas Sunset Red granite in the shape of the "T-Patch", the shoulder insignia of the 36th Infantry, Texas National Guard, the monument memorializes the fighting men of the 36th Infantry. The Division is credited with freeing Rheims, France, during World War I, and was the first American division to invade Europe during World War II.

9. **THE TEN COMMANDMENTS** – Erected 1961 by the Fraternal Order of Eagles of Texas.
Hewn from Texas granite in the traditional shape of the biblical stones and inscribed with the Ten Commandments, the monument was presented to the people and youth of Texas.

10. **TRIBUTE TO TEXAS CHILDREN** – Erected 1998 by the school children of Texas.
The life-sized bronze figures by Lawrence Ludtke, installed at ground level, depict six children on a field trip to the Texas Capitol. The monument honors and celebrates the youth of Texas.

11. **TEXAS PIONEER WOMAN** – Erected 1998 by the Daughters of the Republic of Texas, District VIII.
Honoring the pioneer women of early Texas, a life-sized bronze figure by Linda Sioux Henley depicts a young pioneer mother with baby on her arm. The statue stands atop a Texas Sunset Red granite pedestal.

12. **STATUE OF LIBERTY REPLICA** – Erected 1951 by the Boy Scouts of America.
The bronze miniature Statue of Liberty, mounted on a native limestone base, was presented to the State of Texas as a "pledge of everlasting fidelity and loyalty." The statue was relocated from the south grounds to a new pedestal on the north grounds in 1997. A time-capsule buried nearby is to be opened by Scout officials in 2076.

13. **PEARL HARBOR** – Erected 1989 by the Pearl Harbor Survivors of Texas.

Dedicated to honor those men and women from Texas in the military services who were present on the Island of Oahu, Territory of Hawaii, on December 7, 1941, when the Japanese bombed Pearl Harbor.

14. **KOREAN WAR VETERANS MEMORIAL** – Erected 1998 by the Texas Lone Star Chapter of the Korean War Veterans Association. The star-shaped memorial is dedicated to the more than 289,000 Texans who served in the Korean War, and incorporates the names of the 1723 Texans either killed in action or missing in action. (Source list National Archives and Records Administration, website: www.nara.gov) A bronze eagle by sculptor Edward L. Hankey crowns the memorial.

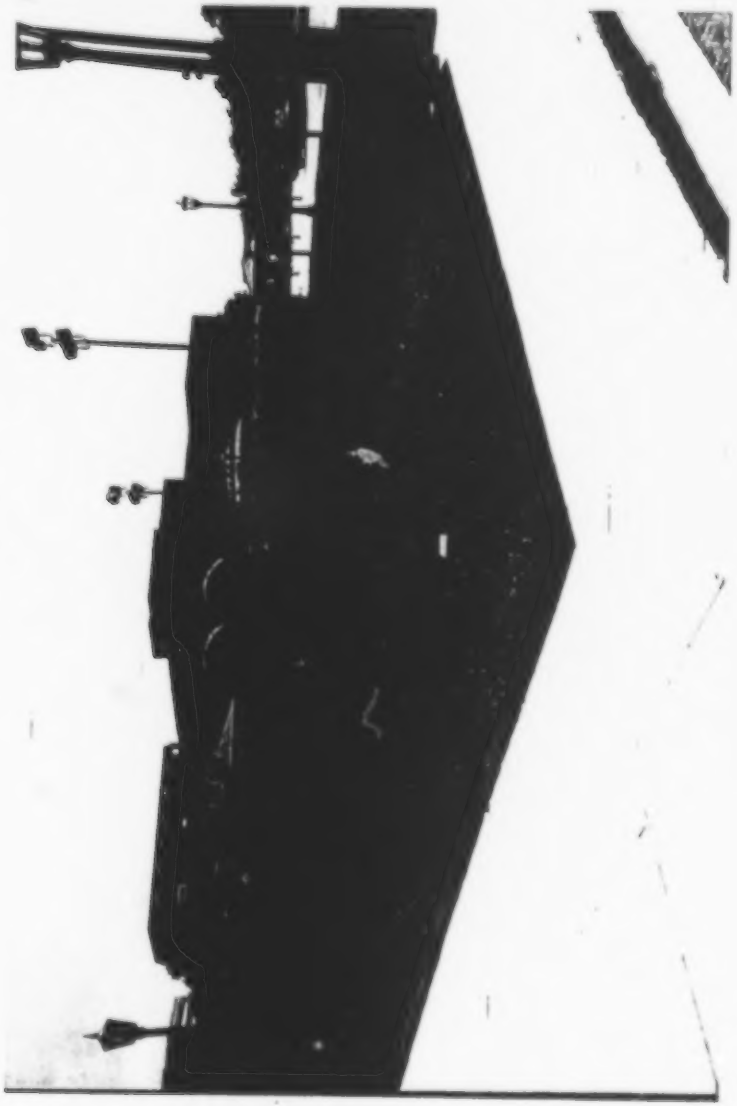
15. **WORLD WAR I** – Erected 1961 by the membership of the Department of Texas, Veterans of Foreign Wars. Constructed of Texas Sunset Red granite, and listing the barracks and auxiliaries that participated in its erection, this monument is dedicated to the memory of World War I veterans.

16. **DISABLED AMERICAN VETERANS OF TEXAS** – Erected 1980 by the membership of the Disabled American Veterans and Auxiliary, Department of Texas. The monument is dedicated to all Texan veterans who have been disabled while serving in the U.S. military services.

17. **TEXAS PEACE OFFICERS MEMORIAL** – Erected 1999 by the Texas Commission on Law Enforcement in cooperation with the State Preservation Board. The memorial was authorized by the 71st Legislature in 1989 to honor law enforcement officers and corrections personnel whose lives have been lost in the line of duty since August 5, 1823, the date when Stephen F. Austin commissioned the first Texas Peace Officers, the first ten Texas Rangers. For information on

names already inscribed or names to be inscribed, please contact:

Texas Commission on Law Enforcement, 6330
U.S. Hwy. 290 East, Suite 200, Austin, TX 78723
Attn: Edward Lain, Chief (or Rita Delgado,
Executive Assistant)
Phone: (512) 936-7722 Fax: (512) 936-7714



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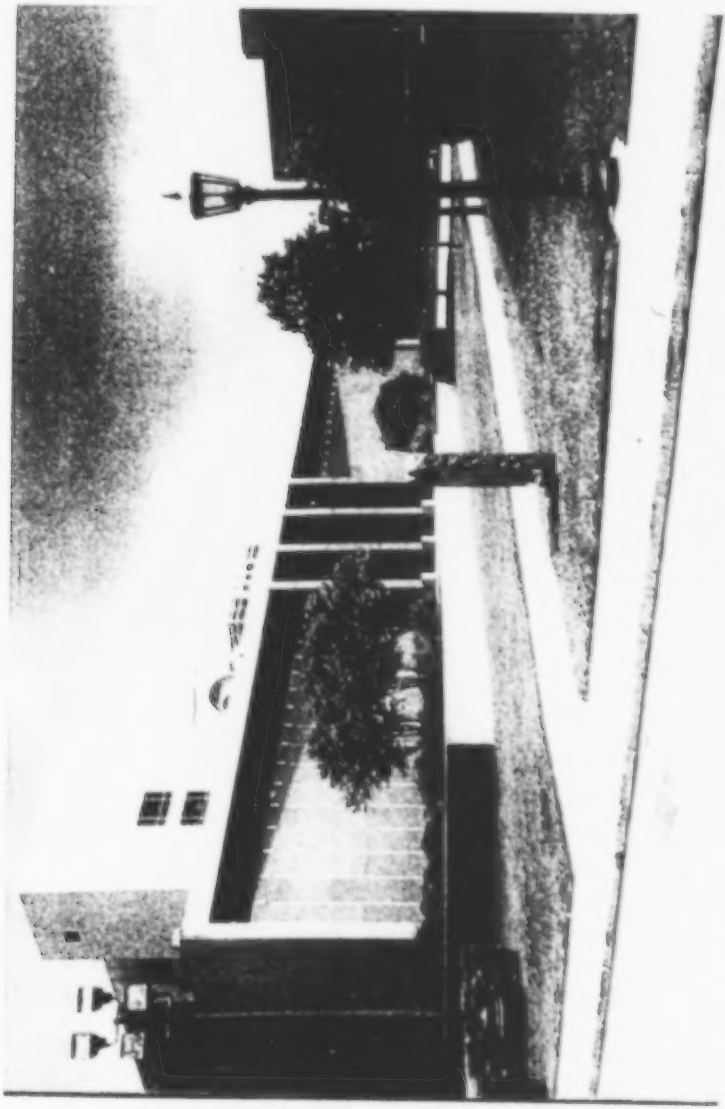

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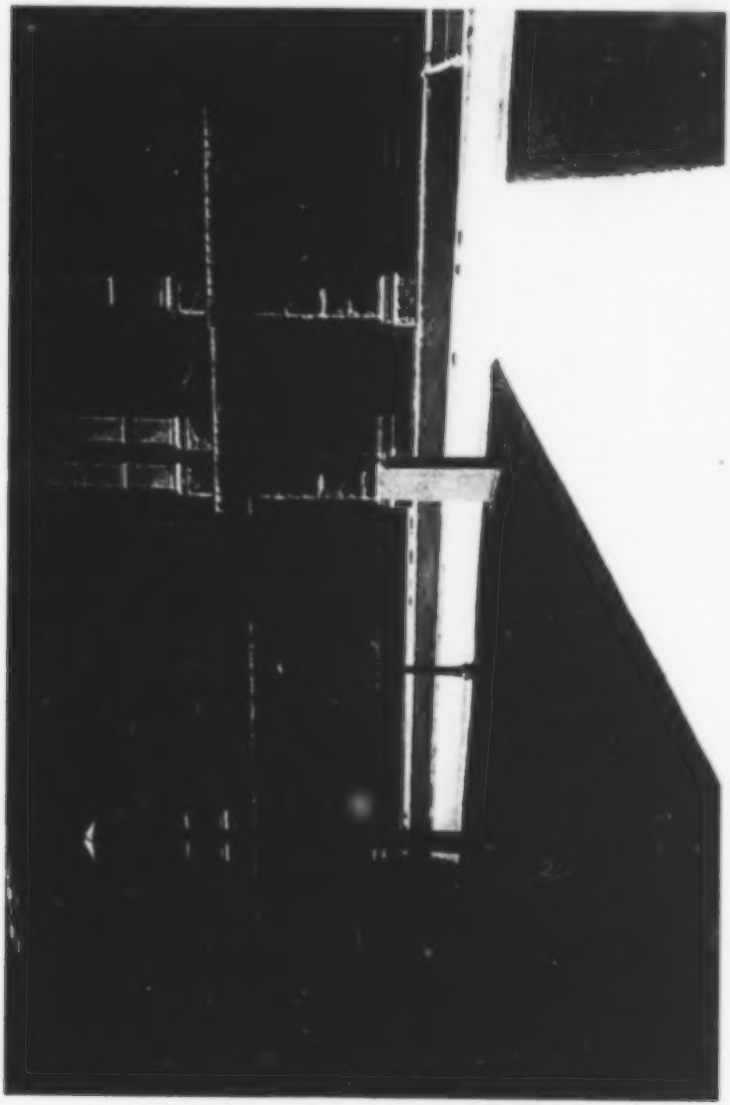

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No. 03-1500

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property on the walkway between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 351 F.3d 173 (5th Cir. 2003). A copy of this opinion is included as Appendix A to the Petition for a Writ of Certiorari. The United States Court of Appeals for the Fifth Circuit denied *en banc* review on January 5, 2004. A copy of this order is included as Appendix B. The decision of the United States District Court is included as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. Const., Amend. I.

STATEMENT OF THE CASE

On the grounds of the Texas State Capitol there is a large – six feet high and three-and-a-half feet wide – granite

monument on which the Ten Commandments are etched. The monument is between the Capitol Building and the Texas Supreme Court, at the corner where the sidewalks in front of these buildings intersect. The Ten Commandments monument is approximately 75 feet from the Capitol building (Stipulation 7, J.A. at 91) and 123 feet from the Supreme Court building. Anyone walking on these sidewalks from the Capitol to the Supreme Court sees this prominently displayed monument.

The monument is in the shape of the tablets that some religions believe that God gave to Moses and contains the following words written in large letters:

> the Ten Commandments
> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shall not kill.
> Thou shall not commit adultery.
> Thou shall not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife nor his manservant nor his maidservant, nor his cattle nor anything that is his neighbor's.

See Exhibit 21 (photograph of the monument) (J.A. at 137).*

On the monument, above the text of the Ten Commandments, there are two small tablets with what appears to be ancient script. Also above the Ten Commandments is a large American eagle grasping the American flag and an eye inside a pyramid, which is similar to the symbol on the one-dollar bill. At the bottom of the monument, below the Ten Commandments, there are two small Stars of David and also two Greek letters, Chi and Rho, superimposed over each other to represent Christ. Exhibit 42 (J.A. at 189-90) (explaining the significance of this symbol). These other symbols are much smaller than the text of the Ten Commandments, which occupies most of the space on the monument. Under the Ten Commandments are the words, "Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas, 1961."

Although there are several other monuments on the grounds of the Texas State Capitol, no other monument is visible from the Ten Commandments monument. Exhibits 48, 53, 57 (J.A. at 210, 211, 212) (photographs showing that there are no other monuments adjacent to or visible from the Ten Commandments monument). In the few-acre area north of the State Capitol, where the Ten Commandments are located, the other displays are a monument paying tribute to children in Texas (Exhibit 20, J.A. at 136), a statue of a pioneer woman holding a child (Exhibit 19, J.A. at 135), a replica of the Statute of Liberty (Exhibit 18, J.A. at 134), and a tribute to Texans who died at Pearl

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* A photograph of the monument is also included as Appendix C to the Petition for a Writ of Certiorari at 21.

Harbor (Exhibit 17, J.A. at 133). 351 F.3d at 176, App. A to Cert. Pet. at 3. The Ten Commandments monument is the closest to the Capitol of any monument in the area. (Stipulation 31, J.A. at 95). No other monument on the Capitol's grounds expresses a religious message.

The Ten Commandments monument is on government property and is owned by the State of Texas. (Stipulation 8, J.A. at 91). Under Texas law, any monument on the Capitol grounds must be approved by the state legislature; erecting a monument without legislative approval is a criminal offense punishable by imprisonment and an impeachable offense if done by a government official. Texas Gov't Code §2165.255. The monument was a gift of the Fraternal Order of Eagles and was accepted by a joint resolution of the Texas House and the Texas Senate in early 1961. Tex. S. Con. Res. 16, 57th Leg. R.S., 1961 Tex. Gen. Laws 1195-1196, Exhibit 1 (J.A. at 97). The resolution also authorized the placement of the monument on the Capitol grounds. *Id.*

The State selected the site for the monument based on the recommendation of the Building Engineering and Management Division of the State Board of Control. Exhibit 2 (J.A. at 101). The expenses of its construction were borne by the Eagles.

The Legislature said little about why it chose to accept the monument. The parties to this litigation stipulated that the legislative history "contain[s] no record of any discussion about the monument, or the reasons for its acceptance, and is comprised entirely of House and Senate journal entries." (Stipulation 3, J.A. at 91). The parties also stipulated that the dedication of the monument was

presided over by Texas Senator Bruce Reagan and Texas Representative Will Smith. *Id.*

The State Preservation Board, an agency of the State of Texas, was created by the Legislature in 1983. Texas Gov't Code §443.001. Ownership of the Capitol Building, including the Ten Commandments monument, was soon transferred to the Board. The Board is vested with and exercises broad authority over the Capitol Building and grounds, including maintaining the Ten Commandments monument. (Stipulation 13, J.A. at 92).

In 1990, Board directed that the Ten Commandments monument be removed and placed in storage during construction of the Capitol extension. (Stipulation 10, J.A. at 91-92). Not every monument removed during the construction was replaced after being taken down. However, in 1993, the State Preservation Board decided to place the Ten Commandments monument back in its prior location, but turned it to face in a different and more prominent direction: directly facing the corner of the two sidewalks that intersect in front of the Texas State Capitol and the Texas Supreme Court. 351 F.3d at 181, Appendix to Cert. Pet. at 15; R.T. at 85. The State paid the costs of removal, storage and reinstallation of the monument. (Stipulation 11, J.A. at 92).

The State is responsible for all of the costs of maintaining the monument. (Stipulations 18 J.A. at 93). The expenses consist of regularly washing and polishing the monument, which is handled by the State Preservation Board. *Id.*

The plaintiff, Thomas Van Orden, is a resident of Austin, Texas and brought this action to have the Ten Commandments monument removed from the grounds of

the State Capitol as violating the Establishment Clause of the First Amendment. The District Court entered judgment for the defendants, and the United States Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals concluded that Texas had permissible secular purposes in placing the monument on government property: honoring the Fraternal Order of Eagles, the monument's donor, for its work against juvenile delinquency, and commemorating the Ten Commandments' "influence upon the civil and criminal laws of this country." 351 F.3d at 173, 181, App. to Cert. Pet. at 9. The Court of Appeals also stated that the Ten Commandments monument did not have the effect of impermissibly endorsing religion because it was one of a number of displays outside, and inside, the Capitol buildings. 351 F.3d at 175-76, App. to Cert. Pet. at 3.

Van Orden's motion for rehearing and suggestion for rehearing *en banc* were denied. His petition for a writ of certiorari was granted on October 12, 2004.

SUMMARY OF ARGUMENT

At the very seat of Texas government, between the Texas State Capitol and the Texas Supreme Court, is a large monument quoting a famous passage of religious scripture taken, almost verbatim, from the King James Bible. The Ten Commandments are a crucial symbol to many religions and express an unequivocal religious message: There is a God and God has proclaimed rules for behavior. The monument, shaped in the form of the tablets that some religions believe God gave Moses, has at its top, in large letters: "I AM the LORD thy GOD." The

commandments that follow express God's dictates for how people should conduct their religious worship and their personal behavior.

The large Texas Ten Commandments monument violates the Establishment Clause for three separate reasons. First, the government is impermissibly discriminating in favor of some religious denominations and sects. This Court long has held that the government may not favor or prefer one religion over others. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (the Establishment Clause means that no State can "pass laws which aid one religion" or that "prefer one religion over another"). Indeed, this Court has declared that there is an "absolute prohibition" against such favoritism. *Abbington School Dist. v. Schempp,* 374 U.S. 203, 225 (1963).

But the Texas Ten Commandments monument is exactly this type of impermissible government favoritism: the government is expressing the religious beliefs of some religions. Many prominent religions, such as Buddhism and Hinduism, reject the Ten Commandments' view that there is a single God who dictates rules for behavior. Even among religions that accept the Ten Commandments, there are significant differences in the content of each religion's version of the Ten Commandments. The Texas Ten Commandments monument is virtually identical to the Protestant version. This government favoritism of one religion, over all others, violates the Establishment Clause.

Second, the government has no permissible secular purpose for placing the Ten Commandments monument at the seat of Texas state government. This Court repeatedly has held that government actions violate the Establishment

Clause if there is not an actual secular purpose. *See Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (invalidating a state law requiring teaching of "creation science" because of the lack of a secular purpose); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (invalidating a state law requiring a moment of "silence" because of the absence of a secular purpose).

The Ten Commandments are a religious symbol and express a religious message. In *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam), this Court declared unconstitutional a Kentucky law requiring the posting of the Ten Commandments in public schools and expressly rejected the claim that there is a secular purpose, such as commemorating the role of the Ten Commandments as a source of law, that justifies their presence on government property. The Court emphasized the inherently religious content of the Ten Commandments and found that there was no secular reason for their being prominently displayed by the government. *Id.* at 41-42. Texas placed the Ten Commandments monument on government property for exactly the same impermissible reason: to express its religious message.

Third, the Ten Commandments monument has the impermissible effect of symbolically endorsing religion. This Court has stressed that a government action violates the Establishment Clause if it symbolically endorses religion or a particular religion. *See, e.g., County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 592 (1989) (invalidating a nativity scene by itself on government property). It is well-settled that "[w]here the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause

is violated." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

The reasonable observer would surely see the Ten Commandments monument as the government endorsing religion because of its *placement*, its *context*, and its *content*. The placement of the monument, at the very seat of Texas state government, means that "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Allegheny County*, 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment) (invalidating a nativity scene in a county courthouse). The context of the monument reinforces its endorsement of religion. The monument sits by itself at the corner between the Texas State Capitol and the Texas Supreme Court. It is the only expression of a religious message on the Capitol's grounds. Finally, the content of the monument is overtly religious: a scriptural passage that many religions regard as fundamental, in the shape of religious tablets, and accompanied by unmistakable religious symbols such as Jewish stars and Greek characters representing Christ.

If the State displayed a creche in the manner and at the place where the Ten Commandments monument is located, its action would be unquestionably unconstitutional under this Court's ruling in *Allegheny County*. 492 U.S. at 621. The Ten Commandments monument at least as clearly violates the Establishment Clause because it is a permanent display that favors particular religions, that lacks any secular purpose, and that conveys the government's endorsement for a profoundly religious message.

ARGUMENT

I. THE TEN COMMANDMENTS MONUMENT EXPRESSES A RELIGIOUS MESSAGE AND IS A RELIGIOUS SYMBOL.

A. The Ten Commandments Are Religious In Their Origin And Their Content.

The Ten Commandments are derived from the Bible and are an important symbol to some, but not all religions. *See, e.g.,* Robert I. Kahn, *The Ten Commandments for Today* 3 (1964) ("the Ten Commandments have always been central both to the Jewish and Christian religions.") They are found in Chapter 20 of the Book of Exodus and are repeated in Chapter 5 of Deuteronomy. Exodus 20:2-17, Deuteronomy, 5:6-21. The Ten Commandments express a message that is thoroughly and essentially religious: there is a God and that God has decreed rules for behavior. These include rules for religious observance, such as, "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images," "Thou shalt not take the name of the Lord thy God in vain," and "Remember the Sabbath Day." There also are rules governing behavior that is not on its face religious, such as, "Thou shalt not kill," "Thou shalt not commit adultery," and "Thou shalt not steal." But in the Ten Commandments these prescriptions, too, convey and define God's command and rule. They are not secular; they express a religious faith and vision.

This, of course, is not the first time that this Court has considered a Ten Commandments display on government property. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), invalidated a Kentucky law requiring the posting of the Ten Commandments in public school classrooms. In

declaring the posting of the Ten Commandments unconstitutional, this Court explained that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." 449 U.S. at 41. Kentucky claimed that it required the posting of the Ten Commandments because of their importance as a foundation for the legal system and, in fact, the bottom of each display contained the statement: "The secular application of the Ten Commandments is seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 1978 Ky. Acts, ch. 436, §1 (effective June 17, 1978), Ky.Rev.Stat. §158.178 (1980).

The Court rejected this attempt to mask a religious message with a secular veil and noted that the first half of the Ten Commandments are entirely about religion: "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness and covetousness. Rather, the first several Commandments concern the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day." *Stone,* 449 U.S. at 41-42 (citations omitted).

The religious nature of the monument between the Texas State Capitol and the Texas Supreme Court is clearly conveyed by its format. The monument is in the shape of the tablets which some religions believe that God gave to Moses. At its very top, in letters larger than used on the rest of the monument, are the words "I AM the LORD thy GOD." As Justice Stevens explained: "[The phrase] 'I AM the LORD thy GOD' . . . is rather hard to square with the proposition that the monument expresses

no particular religious preference – particularly when considered in conjunction with ... [the fact] that the monument also depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ." *Elkhart v. Books,* 532 U.S. 1058 (2001) (Stevens, J., opinion respecting denial of certiorari).

The Ten Commandments are no less religious because they are important to more than one religion. *See County of Allegheny v. American Civil Liberties Union,* 492 U.S. at 615 (Blackmun, J.) (the government's endorsement of Judaism and Christianity violates the Establishment Clause in the same way as endorsement of Christianity alone). The Ten Commandments are not a part of all religions and indeed many faiths reject the religious concepts contained within them. Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere,* Fordham L. Rev. (forthcoming 2005) ("the commandments have no place in Hinduism, Buddhism, Taoism or other non-western faiths. Moslems consider the Jewish Bible to be a holy text, and thus the Ten Commandments may have some religious value, but are clearly not central to the faith.") Other religions regard different symbols as much more important to their beliefs than the Ten Commandments. *See, e.g., SUMMUM v. Ogden*, 297 F.3d 995 (10th Cir. 2002) (freedom of expression requires that the Summum faith be allowed to place a Seven Aphorisms Monument next to the Ten Commandments monument on government property); *SUMMUM v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (court ordered Salt Lake City to place a Seven Aphorisms Monument next to the Ten Commandments monument on government property; the city removed the Ten Commandments monument instead.)

The Ten Commandments are not a general reference to God in a civil context, such as "In God We Trust" on coins. Nor are they universal to all religions. They are derived entirely from certain religious scriptures and they express a specific religious message that only some religions accept. They are thus a clear "government statement that religion or a particular religious belief is favored or preferred." *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. at 773 (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted).

B. Differing Religions Have Varying Versions Of The Ten Commandments And The Choice Of A Version Prefers Some Religions Over Others.

The Fifth Circuit described the monument as displaying "a nonsectarian version of the text of the Commandments." 351 F.3d at 176, App. to Cert. Pet. at 4. This assertion is doubly mistaken: in addition to ignoring the inherently sectarian nature of a religious text deemed holy by only some religions, the Fifth Circuit failed to realize that there is no neutral or nonsectarian form of this particular text shared among religions that do embrace it.

What Texas has placed on its capitol grounds is a version of the Ten Commandments accepted by certain Protestant denominations, but rejected by other Christians as well as Jews. The Texas monument, like others donated around the country by the Fraternal Order of Eagles, "with the exception of some minor word changes in the fourth and fifth line of the text, dealing with 'graven images,' ... is exactly the same as in the King James version of the Bible.... [T]he structuring of the Commandments is identical to the Lutheran catechism."

Finkelman, *supra*, at 18. *See* David Noel Friedman, *The Nine Commandments* 15-16 (2000) (comparing different versions of the Ten Commandments). By choosing one version of the Ten Commandments, Texas has taken sides on a matter of great significance to many religions and religious individuals: the proper way to read and understand a central text of their faiths.

Indeed, "there are at least five distinctive versions of the Decalogue. In some cases the differences among them might seem trivial or semantic, but lurking behind the disparate accounts are deep theological disputes." Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471, 474 (1998).** The Jewish biblical text is comprised of thirteen sentences that are the basis for the Ten Commandments; in Christian texts there are seventeen sentences that are grouped together to form the Ten Commandments. *See* W. Gunther Plaut, ed., *The Torah: A Modern Commentary* 534 (1981). Religions differ greatly in how they present the Ten Commandments and the choice of one version inherently prefers one religion over others.

For example, in Jewish versions of the Ten Commandments, the first commandment is: "I the Lord am your God who brought you out of the land of Egypt, the

** The Protestant version of the Ten Commandments can be found in *The Heidelberg Catechism, Question and Answer 92*, in *Psalter Hymnal* 903-04 (1987). The Catholic version can be found in United States Catholic Conference, Inc., *Catechism of the Catholic Faith* 561 (1991). The Lutheran version can be found in *Luther's Catechism: The Small Catechism of Dr. Martin Luther and an Exposition for Children and Adults Written in Contemporary English* 53 (1982). The Jewish version can be found in 5 *Encyclopedia Judaica* 1442-43 (1971); Solomon Goldman, *The Ten Commandments* 19-20, 28-29 (1956).

house of bondage." Plaut, *supra,* at 534. In the Protestant version, the first commandment is, "Thou shalt have no other gods before me"; in the Catholic version it is, "I am the Lord thy God. Thou shalt not have strange gods before me." Bruce M. Metzger and Michael D. Coogan, eds., *The Oxford Companion to the Bible* (1993). The monument between the Texas State Capitol and the Texas Supreme Court adopts the Protestant version of the first commandment. *See* Exhibit 21 (J.A. at 137).

The second commandment also varies among religions. For Jews, the second commandment states: "You shall have no other gods besides me. You shall not make for yourself a sculptured image." Plaut, *supra,* at 534. In contrast, the Catholic version of the second commandment is, "Thou shalt not take the name of the Lord thy God in vain." The "prohibition against graven images, included in the Jewish Second Commandment, is not found anywhere in the version used in the standard Catholic catechism." Lubet, *supra,* at 475. The Texas monument adopts the Lutheran version which places "Thou shalt not make to thyself any graven images" as part of the first commandment. Exhibit 21 (J.A. at 137).

These differences in the first two commandments among religions are reflected throughout the texts of the varying versions of the Ten Commandments. The fact that Jews, Catholics, Lutherans, and other Protestants all have different first and second commandments leads to a different numbering system throughout the rest of the commandments. For example, the seventh commandment for Catholics is a prohibition on stealing, while this is the sixth commandment for Protestants and Jews.

The Catholic religion separates the prohibition against coveting into two separate commandments. The ninth commandment prohibits coveting "thy neighbor's wife"; the tenth prohibits coveting his goods. The Jewish religion, and most Protestant sects, combine all the prohibitions against coveting into the tenth commandment. Lutherans, however, separate them into the ninth and tenth commandments, but in a way that is different from Catholics. Like the monument in this case, Lutherans make the penultimate commandment the prohibition against coveting "thy neighbor's house" and the last commandment the prohibition against coveting his wife, goods, servants, and cattle.

Differences in the content among the religions and their versions of the Ten Commandments often matter enormously. For instance, the Jewish version of the Ten Commandments says, "You shall not murder." Plaut, *supra*, at 534. But the King James Version of the Bible, which is the basis for the Texas monument, says, "Thou shalt not kill." Exhibit 21 (J.A. at 137). Some religions place great weight on this difference, seeing the prohibition on all "killing" as broader than the outlawing of murder. Plaut, *supra*, at 557 ("Hence the claim of pacifists, who would see this command as a prohibition of killing including that legitimized by the state during warfare cannot be sustained [under the Jewish version]. The same is true of abolition of capital punishment.")

The differences in the wording of the Second Commandment among religions also are extremely important to matters of religious faith and practice. The Catholic Church's version, unlike those of most other religions, does not prohibit graven images. This reflects fundamental differences in religious practices and has been a source of

great tension, and even violence, among religions since at least the Reformation. *See* John C. Holbert, *The Ten Commandments* 10 (2002) ("The reformers of the sixteenth century (especially the radical followers of Calvin) ... use[d] the second commandment as part of their violent polemic against what they thought were the idolatries of the Roman Catholicism.... Statues of Mary, as well as those of many saints, were repugnant to many reformers, and the second commandment became a weapon against their use.") Indeed, even in more recent times, the differing content of the second commandment among religions is a source of conflict and tension. *See, e.g.*, Joseph Lewis, *The Ten Commandments* 26 (1946) (accusing Catholics of having "a mutilated set of Commandments"); Holbert, *supra* at 25 (describing conflicts resulting from varying versions of the second commandment).

Texas in placing this monument on government property is thus making an inherently sectarian choice by adopting the Protestant faith's version of the Ten Commandments. For the State of Texas to declare a prohibition on graven images offends the religious precepts of Catholics. The monument's prohibition of killing, as opposed to murder, is inconsistent with the Jewish Bible. And the entire monument is an affront to adherents of other religions which do not include the Ten Commandments in their scripture and, in fact, reject much of what it expresses.

II. THE GOVERNMENT'S PLACEMENT OF A LARGE TEN COMMANDMENTS MONUMENT BETWEEN THE TEXAS STATE CAPITOL AND THE TEXAS SUPREME COURT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT FAVORS SOME RELIGIONS OVER OTHERS, BECAUSE THERE IS NO SECULAR PURPOSE, AND BECAUSE THE EFFECT IS IMPERMISSIBLY TO ENDORSE RELIGION.

The large Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court is unconstitutional for three separate reasons. First, the State is impermissibly discriminating among religions by placing a religious symbol and a message accepted by some religions and not others at the seat of the Texas state government. *See, e.g., Abbington School Dist. v. Schempp,* 374 U.S. 203, 225 (1963) (the government may not discriminate among religious sects). Second, there is no secular purpose in a religious message being prominently displayed on government property. *See, e.g., Stone v. Graham*, 449 U.S. at 41 (Ten Commandments displays in public schools deemed unconstitutional because of the lack of a secular purpose). Third, the clear and unequivocal effect of the Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court is an impermissible government endorsement of religion. *See, e.g., Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original) ("when the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid.")

A. The Ten Commandments Monument Violates The Establishment Clause Because It Favors Some Religions Over Others.

This Court long ago ruled that "[t]he state may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . *This prohibition is absolute.*" *Abbington School Dist. v. Schempp,* 374 U.S. at 225 (emphasis added). The Court later explained that "Madison's vision – freedom for all religions being guaranteed by free competition among religions – naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference." *Larson v. Valente*, 456 U.S. 228, 245 (1982). Thus, this Court has concluded that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

The Texas Ten Commandments monument is a "denominational preference": it is a religious symbol and conveys a religious message adopted by some religions and not others, and indeed expresses one faith's version of the Ten Commandments at the seat of the Texas state government. Such favoritism is absolutely prohibited under *Schempp* and, at the very least, the Fifth Circuit erred by not applying *Larson v. Valente* and requiring that the State meet strict scrutiny to justify such favoritism for some religions over others.

Under that test, the Texas monument is clearly unconstitutional. There is no compelling reason for having a Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court. Any secular message surely could be expressed in other, non-religious, ways.

This favoritism is sufficient by itself to have the Texas Ten Commandments monument declared unconstitutional, for this Court has stressed that the "history and logic of the Establishment Clause [mean] that no State can pass laws which aid one religion or that prefer one religion over another." *Larson v. Valente*, 425 U.S. at 245 (citation omitted).

B. The Ten Commandments Monument Violates The Establishment Clause Because There Is No Legitimate Secular Purpose For The State's Installing It On Government Property Between The Texas State Capitol And The Texas Supreme Court.

This Court also has been clear that a government action violates the Establishment Clause unless there is a valid secular purpose for it. *See, e.g., Stone v. Graham,* 449 U.S. at 41; *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). As the Court has explained, the purpose inquiry "asks whether the government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

There is not a secular purpose for placing a six-foot high, three-feet wide monument containing passages from the Bible of some religions, and adorned with a representation of Christ and Stars of David, at the heart of Texas state government between the Capitol and the Supreme Court. The parties to this litigation stipulated that the legislative history "contain[s] no record of any discussion about the monument, or its reasons for acceptance." (Stipulation 3, J.A. at 91). Therefore, it is impossible for the State to meet this Court's requirement that the government show an "actual purpose" that is secular. *Edwards v. Aguillard*,

482 U.S. at 585 (quoting *Lynch v. Donnelly,* 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

Nonetheless, in the absence of a demonstrable "actual purpose," the Court of Appeals speculated that there were two permissible secular purposes for the monument. First, the court said that "the purpose of the legislature was 'to recognize and commend a private organization for its efforts to reduce juvenile delinquency.'" 351 F.3d at 179, App. to Cert. Pet. at 9. This was based entirely on the Texas legislature's resolution granting the Eagles permission to erect the monument. *Id.* But in accepting this rationale, the Court of Appeals violated this Court's command that courts "distinguish a sham secular purpose from a sincere one." *Santa Fe Indep. School Dist. v. Doe,* 530 U.S. 290, 308 (2000).

It strains credulity to say that the Texas legislature installed the Ten Commandments monument to condemn juvenile delinquency or to praise the Fraternal Order of Eagles. It makes no sense to suggest that the posting of a Biblical passage that makes almost no reference to juveniles was motivated by a concern over delinquency. The monument itself says nothing about the issue. Nor is there any indication that the Fraternal Order of Eagles engaged in programs in Texas or that the Texas legislature really had any familiarity with its efforts. There were countless ways that Texas could have praised the Fraternal Order of Eagles if it wished to do so; accepting a gift from an organization is a dubious way of honoring it. Placing the monument on government property obviously was all about its content, the Ten Commandments, and the State's desire to express and exalt this religious text.

At most, acknowledging the Fraternal Order of Eagles efforts may have coincided with the acceptance of the gift, but hardly can be said to be the reason that the State posted the Ten Commandments between the Texas State Capitol and the Texas Supreme Court. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) (the requirement for a secular purpose is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes.")

Moreover, the Fifth Circuit erred in focusing on just the time at which the monument was accepted and not on when the State took the monument out of storage and reinstalled it. The State Preservation Board took the monument down in 1990 and put it back facing in a different, more prominent position in 1993. (Stipulations 10, 11, J.A. at 91-92). Other monuments that were removed at the same time were never put back on display. There is no indication that the State's goal in 1993 was to honor the Fraternal Order of Eagles. The State has given no reason for this Court to doubt that the State put the monument back, and in a prominent place, because of the State's desire to express the content of the monument, the Ten Commandments.

This Court has explained that "[w]hile the Court is normally deferential to a State's articulation of a purpose, . . . the statement of such purpose [must] be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. at 586-87. For the State to claim that its purpose was anything other than presenting the Ten Commandments is such a "sham."

Second, the Court of Appeals found an alternative permissible purpose, declaring the "Commandments have a secular dimension as well as a religious meaning." 351

F.3d at 179. However, there is no indication that this was the legislature's purpose in placing the monument on government property and this Court has stressed that the focus must be exclusively on the government's "actual purpose." *Edwards v. Aguillard*, 482 U.S. at 585.

Moreover, as this Court recognized in *Stone v. Graham*, the Ten Commandments are inherently religious. There is no secular purpose in placing on government property a monument declaring: "I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make thyself any graven image. Thou shalt not take the Name of the Lord thy God in vain." As the Court declared in *Stone v. Graham*, "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." 449 U.S. at 42. The same is true in placing the Ten Commandments between the Texas State Capitol and the Texas Supreme Court.

The Court of Appeals stressed the Ten Commandments' "influence upon the civil and criminal laws of this country." 351 F.3d at 181, App. to Cert. Pet. at 14-15. But characterizing the Ten Commandments monument as secular and as a source of American law is incorrect for many reasons. First, the format of the Ten Commandments monument conveys its religious message, not its secular role. For example, the size of the lettering on the monument emphasizes the religious aspect of the Ten Commandments over the secular. The prefatory words, "I AM the LORD thy GOD," appear larger on the monument than the commandments that have been incorporated into secular law. The Commandments' prohibitions on murder, adultery, and theft are smaller than the text which identifies God as the source of the commandments. By visually emphasizing the religious aspects of the Ten Commandments

relative to the arguably secular, the monument belies the claim that it is commemorating any secular role of the Ten Commandments in American law.

Second, the content of the commandments themselves shows that it has little relationship to American secular law. The first four commandments listed – "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images," "Thou shalt not take the name of the Lord thy God in vain," "Remember the Sabbath day to keep it holy" – are religious mandates. Any law that imposed these requirements would unquestionably violate the Establishment Clause. As Professor Marci Hamilton explains: "[W]ere the first four commandments enacted into law today, they would constitute plain constitutional violations. It is an exceedingly strange, and strained, argument that argues the primacy of the Ten Commandments as the true source of law when the first four simply *cannot* be enacted into law, because they would conflict with our Constitution. The first four prove that the Commandments are religious rules, not civil law." Marci Hamilton, *The Ten Commandments and American Law*, at http://writ.news.findlaw.com/hamilton/20030911 (September 11, 2003).

Moreover, several of the other commandments have no relationship at all to American law. "Honor thy father and mother" and "Thy shalt not covet thy neighbor's wife, nor his manservant, nor his maid servant, nor his cattle, nor anything that is thy neighbors" are not, and never have been, legal commands in our legal tradition.

Thus, only a few of the commandments – "Thou shalt not kill," "Thou shalt not steal," "Thou shalt not bear false witness against thy neighbor," and "Thou shalt not commit

adultery" – have any relationship to American law. But even as to these, the Ten Commandments are not a special source for the American legal rules: virtually every legal system, before and after the Ten Commandments, prohibits murder, theft, and perjury. *See* Steven K. Green, *The Fount of Everything Right and Just*, 14 J.L. & Religion 525 (2000). Indeed, Hammurabi's Code, often regarded as the first written law, nearly a 1,000 years before the Ten Commandments, contained these prohibitions. *The Hammurabi Code* at ix (trans. Chilperic Edwards, 1904) (criticizing what he calls "arrogant claims in regard to the originality or excellence of the Jewish Pentateuch.") Why does Texas have a monument to the Ten Commandments and not Hammurabi, or the Magna Charta, or any other source of law? Precisely because the Ten Commandments conveys an explicit religious message that these other sources of law do not.

Third, a careful review of history shows that the Ten Commandments were seldom invoked in forming American law. The only explicit connection between the Bible and American law is found in the early Puritan colonies of Massachusetts and Connecticut. The Puritans regarded themselves as "chosen people" and their land as a "second Israel." Stephen Botein, *Early American Law and Society* 25-26 (1983). But even among the Puritans, the influence of Mosaic law on their legal codes was small. *See* Zechariah Chaffee, Jr., *Colonial Courts and the Common Law, Essays in the History of Early American Law* 72-73 (D. Flaherty ed., 1969) ("the view that the colonial law was . . . drawn from the Bible is dispelled by a study of the court records ."); George E. Woodbibe, *The Suffolk County Court, 1671-1680, Essays in the History of Early American Law* 202 (D. Flaherty, ed. 1969) ("Undoubtedly the influence of

[Mosaic] law as an active legal force in [Puritan] civilization has been greatly overstated.")

Nor is there any indication that the Ten Commandments were regarded as a source of secular law in the founding of this nation. They are not mentioned in the records of the Constitutional Convention nor in the history of state legislatures drafting their initial statutes. Not once are the Ten Commandments mentioned in the *Federalist Papers*. After examining the claim that Ten Commandments were a source of American law, Professor Steven Green concludes: "Thus absent a handful of early cases, judicial reliance on the Ten Commandments as a source of law was all but nonexistent. . . . The historical record fails to support claims of a direct relationship between the law and the Ten Commandments. Absent the failed experiment in seventeenth century Massachusetts and other Puritan colonies, American law has generally been viewed as having a secular origin and function." Green, *supra*, at 558.

The irony is that those who favor the Ten Commandments on government property, such as here between the Texas State Capitol and the Texas Supreme Court, do so precisely because of the religious content of the Ten Commandments and the importance of the Decalogue as a religious symbol. Yet, supporters of Ten Commandments monuments are forced to defend them as secular, as the Fifth Circuit did here. 351 F.3d at 181, App. to Cert. Pet. at 14-15. This denigrates religion by denying the essential and profoundly religious nature of the Ten Commandments. *See, e.g.*, Ronald S. Wallace, *The Ten Commandments* viii (1965) ("the Ten Commandments . . . are one of the important focal points within the Bible. If they have been given prominence within the discipline of the

[Protestant] Church, this is simply because they have prominence within the Word which the Church has sought to obey.")

There is no secular purpose for the Ten Commandments being prominently displayed between the Texas State Capitol and the Texas Supreme Court, any more than there was a valid secular purpose for the Ten Commandments being posted in public school classrooms in *Stone v. Graham*. Here, as in that case, the government's purpose is to advance religion and thus to violate the Establishment Clause.

C. The Large Ten Commandments Monument Between The Texas State Capitol And The Texas Supreme Court Violates The Establishment Clause Because It Is An Impermissible Government Endorsement of Religion.

This Court also has been clear that a government action violates the Establishment Clause if it symbolically endorses religion or a particular religion. *See, e.g., Allegheny County,* 492 U.S. at 592 ("In recent years, we have paid particularly close attention to whether the challenged governmental practice has either the purpose or effect of 'endorsing' religion, a concern that long had a place in our Establishment Clause jurisprudence.") As Justice O'Connor explained: "As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not [be] . . . conveying a message that religion or a particular religious belief is favored or preferred." *Allegheny County,* 492 U.S. at 627 (O'Connor, J., concurring in part and concurring in the judgment); *see also Capitol Square Review and Advisory Board,* 515 U.S. at 777 (O'Connor, J., concurring in part

and concurring in the judgment) (the Establishment Clause is violated "when the reasonable observer would view a government practice as endorsing religion.")

Assuming a secular purpose, not every display of the Ten Commandments is unconstitutional, just as not every nativity scene on government property violates the First Amendment. *Compare Lynch v. Donnelly*, 465 U.S. 668, 671, 680 (1994) (upholding a nativity scene as part of a larger holiday display), *with Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. at 621 (invalidating a nativity scene by itself on government property). For example, a reasonable observer might be more likely to understand the government's asserted secular message if the Ten Commandments monument is installed as part of a larger display depicting various sources of law, with several religious and secular monuments of the same size grouped together.***

The frieze on the wall of the Supreme Court is exactly this type of permissible display. The frieze depicts Moses holding the Ten Commandments – quite significantly without any writing on the tablets and therefore without any explicit religious message being conveyed. Additionally, there are two other religious figures on the frieze, Confucius and Mohammed, and many secular figures including Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall. As Justice Stevens explained, the placement of all of these historical figures together on the frieze signals a respect for great lawgivers,

*** Different issues arise if the secular displays are not added until after an Establishment Clause challenge has been filed. The reasonable observer presumably would be aware of that history as well. *See Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000).

not great proselytizers. *Allegheny County*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part).

But that is not at all the case here. The Ten Commandments sits by itself, in a prominent position between the Texas State Capitol and the Texas Supreme Court, with no other monuments visible when standing before it. Exhibits 48, 53, 57 (J.A. at 210, 211, 212) (photographs showing no other monument adjacent to or visible from the Ten Commandments monument). There is no other religious monument anywhere on the grounds of the State Capitol. The "reasonable observer" who sees the Ten Commandments monument can draw but one conclusion: that the State of Texas endorses the religious views expressed on it.

This Court has explained that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly,* 465 U.S. at 694. Three factors make it likely that the "reasonable observer" would see this Ten Commandments monument as impermissibly endorsing religion: its placement, its context, and its content.

1. The placement of the Ten Commandments Monument

This Court has recognized that a display at the seat of government, so plainly under government ownership and control, is marked with the government's seal of approval. *Allegheny County*, 492 U.S. at 599-600. The State Capitol Building and its 27 acres of grounds are the seat of government in the State of Texas. The Ten Commandments

monument is located at the intersection of two sidewalks, one that runs in front of the State Capitol building and the other in front of the Texas Supreme Court. (J.A. at 50). The monument is 75 feet from the Texas State Capitol, which houses the Texas State Legislature and the Texas Governor's office. (Stipulation 31, J.A. at 95). The monument is 123 feet from the Texas Supreme Court building, which houses the Texas Supreme Court, the Texas Court of Criminal Appeals, some offices of the State Attorney General, and the Texas State Law Library. The monument immediately abuts the "Great Walk," which tightly encircles the Capitol building, and it is angled so that anyone walking on these sidewalks from the Texas State Capitol to the Texas Supreme Court will see it prominently displayed.

In *Allegheny County*, the location of the nativity scene was crucial to the Court's conclusion that it violated the Establishment Clause. The Court noted that the creche was displayed in the main and most beautiful part of the county courthouse. As Justice O'Connor explained, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government. . . . [B]y permitting the display of the creche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment).

Even more than the county courthouse in *Allegheny County*, no reasonable viewer could see the Ten Commandments monument in this case, directly in front of the Texas State Capitol and the Texas Supreme Court, without thinking that it has "the support and approval of the

government." An individual must pass through gates, many of which are guarded, to gain access to the State Capitol grounds. Texas law is clear and strict in providing that only the government can place monuments in the Capitol area. Texas law makes it a criminal offense, punishable by fine of up to $1,000 and imprisonment of up to one year if a "[p]erson, including a state officer or employee . . . without the prior express consent of the legislature . . . builds, erects, or maintains a building, memorial, monument, statue, concession, or other structure on Texas State Capitol grounds." Texas Gov't Code §2165.255. The Texas statute also provides that a state officer who violates this law "is subject to removal by impeachment" and that "[a]ny other state officer or employee who violates [this] shall be dismissed immediately from state employment." *Id.*

This complete government control over the area where the monument is located strongly communicates that the government is endorsing the religious message contained on the Ten Commandments monument. The "reasonable observer" would not even need to know the history of this Ten Commandments monument to understand that the government is responsible for it being on government property.

But the history makes the government's endorsement even clearer. *See Capitol Square Review & Advisory Board*, 515 U.S. at 779-780 (O'Connor, J., concurring in part and concurring in the judgment) (the "reasonable" observer knows "the history and context of the community and the forum in which the religious display appears.") First, as required by Texas law, the Texas legislature

formally accepted the monument and authorized its placement on the Capitol's grounds by a joint resolution of the House and the Senate. Tex. S. Con. Res. 16, 57th Leg. R.S., 1961 Tex. Gen. Laws 1195-1196, Joint Exhibit 1 (J.A. at 97). The State chose the location of the monument and placed it in a symbolically important position: between the Texas State Capitol and the Texas Supreme Court. (Stipulation 6, J.A. at 91).

Second, the State removed the monument for a period of time and then chose to put it back on government property in its current location. While other monuments in the area north of the Capitol were taken down and not replaced, in 1993, the State Preservation Board decided to return the monument to its original place on the Capitol grounds, between the Capitol and the Texas Supreme Court, and to position it so that it was angled for maximum viewing at the corner of the sidewalk running between these two buildings. 351 F.3d at 181; Tr. at 85.

This Court has made it clear that neither the inscription saying that the monument was donated by the Fraternal Order of Eagles nor that organization's funding of the initial construction lessen the symbolic endorsement of religion conveyed by this large monument expressing a religious message on government property. In *Allegheny County*, the nativity scene bore a similar dedication that it had been donated by a private group. 492 U.S. at 600. But the Court explained that "[t]he fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion [of government endorsement.] On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own." *Id.* The case is even clearer here, for

this inscription implies, clearly and correctly, that it is the state which owns the monument. These Ten Commandments are, literally and constitutionally, the state's own words.

Nor does it matter that the monument was initially financed by the Fraternal Order of Eagles. In *Stone v. Graham*, the Court explained: "It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." *Stone,* 449 U.S. at 42. The record is clear that the State of Texas authorized its installation in 1961; authorized and paid to have the Ten Commandments monument placed back on government property in 1993; and is responsible for the costs of maintaining the monument. (Stipulation 18, J.A. at 93). In *Stone v. Graham,* 449 U.S. at 42 n. 4, this Court found significant that "while the actual copies of the Ten Commandments were purchased through private contributions, the state nevertheless expended public money in administering the statue."

The placement of the Ten Commandments at the seat of Texas government, between the Texas State Capitol and the Texas Supreme Court, conveys unmistakable government endorsement for religion.

2. The context of the Ten Commandments monument

The Ten Commandments display sits on a corner by itself in front of the Texas State Capitol and the Texas Supreme Court. No other monument or display is next to, or even visible from, the Ten Commandments monument.

Exhibits 48, 53, 57 (J.A. at 210, 211, 212). The closest monuments in the area of the Ten Commandments, north of the State Capitol, are the Texas Pioneer Woman and a Tribute to Texas Children. The Ten Commandments monument is separated from these by 120 feet and 111 feet, respectively, (Stipulation 31, J.A. at 95), and by a number of rows of hedges which entirely block their view from the Ten Commandments monument. The other monuments in the area north of the Capitol, which are even further from the Ten Commandments monument, are a replica of the Statue of Liberty and a monument honoring veterans of Pearl Harbor. These also are not visible from the Ten Commandments monument. *See* Exhibits 48, 53, 57 (J.A. at 210, 211, 212)

Context is crucial in determining that there is a government symbolic endorsement of religion. In *Lynch*, this Court upheld a religious display, a nativity scene, because the viewer saw a creche as well as a Santa House, Santa, a Christmas tree, statues of carolers, and other traditional symbols of the December holiday season. 465 U.S. at 671, 680. The creche was part of a unified display, with all of the symbols within the view of the observer, concerning the holidays.

But the Ten Commandments display between the Texas State Capitol and the Texas Supreme Court is not part of such a unified display. The Ten Commandments does not fit into any overall theme for the monuments on the Capitol's grounds. Quite the contrary, as the *only* religious symbol in the area, the monument expresses clear endorsement for religion. Thus, the Ten Commandments monument is like the nativity scene that this Court declared unconstitutional in *Allegheny County*, and unlike

the one upheld in *Lynch*, because it is a solitary religious symbol on government property.

The Fifth Circuit, in upholding the Texas Ten Commandments monument, stressed the number of displays in the entire Capitol area, including inside the Capitol building and above the bench in the Supreme Court. 351 F.3d at 175-176, App. to Cert. Pet., at 3. The court explained: "The Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court building and the Capitol Building housing the legislative and executive branches of government." 351 F.3d at 182, App. to Cert. Pet. at 17. In an effort to find other religious symbols, the court pointed to a Six Flags Over Texas Display on the floor of the Capitol rotunda, which contains a Mexican eagle and serpent that the court described as a "symbol of Aztec prophecy." *Id.* The court also noted that above the bench in the Texas Supreme Court is the Latin phrase, "Sicut Patribus, Sit Deus Nobis," which the court translated as saying, "As God was to our fathers, may He also be to us." *Id.*

The Fifth Circuit erred in describing the context of the display in this way. First, the appropriate focus must be on what the viewer of the Ten Commandments monument sees in looking at it and the area immediately around it. No other monuments are visible when looking at the Ten Commandments display and at most, four are in its immediate vicinity – the Pioneer Woman monument, the Texas Children monument, a Statue of Liberty replica, and the Pearl Harbor display. What is contained inside buildings is not relevant; there is no reason to believe that the reasonable observer who passes by this monument will go

in the buildings or associate the symbols there with the Ten Commandments. The Texas Capitol grounds encompass 27 acres. Surely it cannot be that a religious symbol anywhere on those grounds makes all other religious symbols anywhere on the property permissible.

This Court made exactly this point in invalidating the nativity scene in *Allegheny County*. In that case, a creche was displayed alone and the viewer saw only the creche and its floral flame. The Court declined the government's invitation to consider decorations throughout the building and in a nearby forum as part of the creche display. 492 U.S. at 598 n. 48. The Court obviously refused to assume that the viewer had taken a tour of the building or of the nearby areas. Context was restricted to what the viewer saw when observing the questioned display. Justice Blackmun included a photograph as an appendix to his opinion to show what the viewer looking at the creche would see. 492 U.S. at 622 (Blackmun, J.). In this way, the photograph of the Ten Commandments monument in this case is virtually identical in that the viewer sees a large Ten Commandments display unaccompanied by other symbols in its immediate area. Exhibits 48, 53, 57 (J.A. at 210, 211, 212)

Second, even if the entire area of the Capitol is viewed, there are not religious symbols anything like the Ten Commandments monument anywhere else on the grounds. The Fifth Circuit points to an image of a Mexican eagle and a serpent, which is part of a larger painting on the floor inside the Capitol rotunda, and says that this is religious because it is an Aztec symbol. It is doubtful that the reasonable observer would know this or think of a picture of an eagle and a serpent as religious. Likewise, the untranslated Latin phrase above the bench of the

State Supreme Court is unlikely to be understood as religious by the reasonable observer.

Third, in addition to being a symbol of some religions and commemorating a religious event, the Ten Commandments monument expresses a religious message. The monument unequivocally proclaims that there is a God and that God has decreed rules for religious observance and non-religious conduct. No other monument anywhere on the grounds of the Texas State Capitol conveys a religious message. Other monuments memorialize notable heroes and commemorate worthy acts; this one exalts and expresses one religion's view of God's commands.

As in *Allegheny County*, the Ten Commandments monument as the sole religious symbol and religious expression on government property is an impermissible symbolic endorsement of religion. Actually, the strong impression of government approval and endorsement of religion is even more compelling than in *Allegheny* because the display is permanent and viewed year-round, rather than temporary and viewed only at the holiday season. A temporary display placed on government property in the time between Thanksgiving and New Year's Day might be seen as celebrating the holidays. But a permanent display, such as the monument in this case, can convey only one message: government endorsement of the religious message contained on it. Many lower courts in determining what is an impermissible symbolic endorsement of religion have stressed that permanent displays convey a different, more obviously religious message. *See, e.g., Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001); *Books v. City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *Harris v. City of Zion*, 927 F.2d 1401, 1412 (9th Cir. 1991).

The Fifth Circuit, in this case, gave great weight to the fact that the display had been on the State Capitol ground for 42 years before a constitutional challenge was brought. 351 F.3d at 181, App. to Cert. Pet. at 17. But the monument's continued presence on government property magnifies, not lessens, the symbolic endorsement of religion. The reasonable observer who knows that the monument has been on government property for four decades would see it as the State of Texas long endorsing religion. A nativity scene at the seat of government for 42 years surely would be more, not less, offensive to the Establishment Clause than one placed there for a short period of time at the December holiday season.

3. The content of the Ten Commandments monument

The government's symbolic endorsement of religion is most obvious from the content of the monument itself. In large letters, the monument proclaims "I AM the LORD thy GOD" and many specific commandments profess religious mandates, such as, "Thou shalt not take the name of the Lord thy God in vain" and "Remember the Sabbath day, to keep it holy."

Moreover, the monument's other symbols heighten and highlight its endorsement of religion. At the bottom of the Ten Commandments monument there are two small Stars of David and two Greek letters, Chi and Rho, superimposed over each other to represent Christ. The monument also has, prominently displayed above the lettering, an American eagle grasping a flag.

First, the presence of symbols of Judaism and Christianity themselves endorse religion. As Justie Blackmun

explained: "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allegheny*, 492 U.S. at 615. (Blackmun, J.). The monument's containing symbols of two religions, but no others, violates the Establishment Clause because "it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. at 309-310 (citation omitted).

Second, the prominent placement of the American eagle gripping an American flag further expressly conveys the linkage between government and specific religions. As the Seventh Circuit explained in discussing an identical monument on government property: "In this regard, the placement of the American eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government." *Books v. City of Elkhart,* 235 F.3d at 307. Just as the floral and evergreen decoration surrounding the creche display in the Allegheny County courthouse "contribute[d] to, rather than detract[ed] from, the endorsement of religion conveyed by the creche," *Allegheny County*, 492 U.S. at 599, the patriotic symbols on the Texas monument strongly contribute to the impression that the government itself is endorsing religion.

4. The location, the context and the content of the monument together are a clear symbolic endorsement of religion.

This Court has explained that a crucial question in Establishment Clause analysis is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval of their religious choices." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). The factors described above explain why adherents of "controlling denominations" will view the Ten Commandment as an endorsement of their religions and why nonadherents will see it as a "disapproval of their religious choices." Located at the very seat of Texas state government, the monument symbolizes and expresses a message of religious faith.

If Texas placed a nativity scene exactly where the Ten Commandments monument is located, there is no doubt that under this Court's decision in *Allegheny County*, that the Establishment Clause would be violated. The Ten Commandments monument in this case even more clearly violates the Establishment Clause because it expresses an unequivocal religious message by quoting from the scriptures of some religions.

In a recent opinion elaborating on when the government impermissibly endorses religion, Justice O'Connor pointed to four factors that should guide analysis: "History and ubiquity," "Absence of worship or prayer," "Absence of reference to particular religion" and "Minimal religious content." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2323-326 (2004) (O'Connor, J., concurring in the judgment). These factors – especially the latter two

– strongly indicate that the Texas Ten Commandments monument violates the Establishment Clause.

As to the first factor, "history and ubiquity," Ten Commandments monuments of the sort involved in this case are of relatively recent origins and certainly are not ubiquitous in the way of "In God We Trust" on coins or the words "Under God" in the Pledge of Allegiance. As Professor Laycock explains: "[T]here is no long and ubiquitous history of large monuments displaying the text of the Commandments. . . . A few hundred monuments scattered around the country does not compare to 'our most routine ceremonial act of patriotism' repeated daily in more than a million classrooms." Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty,* 118 Harv. L. Rev. 155, 236 (2004).

As to the second factor, "absence of worship and prayer," the Ten Commandments monument is not an act of worship or prayer. But Justice O'Connor has explained that "[a]ny statement that has its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history." *Elk Grove Unified School District*, 124 S.Ct. at 2324 (O'Connor, J., concurring in the judgment). This Court already has recognized that this is exactly the effect of a Ten Commandments display. In *Stone v. Graham*, 449 U.S. at 42, in invalidating a law requiring the Ten Commandments be posted in public schools, this Court explained: "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce school children to read, meditate upon,

perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."

As for the third factor, "reference to particular religions," the Ten Commandments monument expressly favors some religions over others in that some regard the Decalogue as a core religious symbol, while other religions do not. Moreover, the striking differences among religions in their versions of the Ten Commandments requires the government to choose one religion over others. As described earlier, Texas chose the Protestant, King James, version of the Ten Commandments for its monument. This is crucial because this Court has declared that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. at 244. Indeed, Justice O'Connor recently stressed this when she declared, "no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. at 2326 (O'Connor, J., concurring in the judgment). There is no general expression of law or morality in the Texas monument. Rather, this is state endorsement of a particular Christian sect's interpretation of a specific scriptural passage. The Texas Ten Commandments monument can be read only as choosing one religion's commandments over those of all other religions.

Finally, as to the last factor, it cannot be said that the Texas Ten Commandments monument has "minimal religious content." Justice O'Connor explains that "the brevity of a reference to religion or to God in a ceremonial

exercise can be important." *Id.* The reference to religion and God is not brief or minimal in the Ten Commandments monument. The words, in large letters, "I AM the LORD thy GOD," and the explicitly religious commands, make it clear that this is a religious proclamation. The reasonable observer surely knows that it is derived from the Bible. Rather than being minimal, religion obviously predominates the monument.

Thus, these four factors demonstrate that the Texas Ten Commandments monument's location, context, and content make it an impermissible symbolic endorsement of religion. *See* Laycock, *supra,* at 237-38 ("Large textual displays of the Ten Commandments should be an easy case under Justice O'Connor's four factors.") The "endorsement test does not prohibit government from acknowledging religion or from taking religion into account in making law and policy. It does preclude the government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring in the judgment). The Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court does precisely this by having the government express a religious message and, indeed, the religious beliefs of a particular religion whose version of the Decalogue is etched on this large stone tablet.

CONCLUSION

Texas has placed a large monument with the Ten Commandments at a uniquely prominent place between the Texas State Capitol and the Texas Supreme Court for one reason: the Ten Commandments are a religious message that is very important to certain specific religions. But it is for exactly this reason that the Ten Commandments monument violates the Establishment Clause of the First Amendment and the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

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Supreme Court, U.S.
FILED
JAN 31 2005
OFFICE OF THE CLERK

No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether a monument bearing the Ten Commandments, which has stood for over forty years and is surrounded by sixteen other monuments on the Texas Capitol Grounds, constitutes an impermissible establishment of religion in violation of the First Amendment.

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STATEMENT OF THE CASE

In 1888, the People of Texas dedicated the Texas Capitol and its Grounds, approximately twenty-two surrounding acres. J.A., at 112. Three years later, the first monument was built on the Grounds and dedicated to the Texans who died at the Alamo. *Id.*, at 113. Today, seventeen monuments and twenty-one historical markers adorn the Capitol Grounds, *id.*, at 204, together commemorating people, events, and ideals that have contributed to the history, diversity, and culture of Texas. *See* Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473.

The Capitol and its Grounds are listed on the National Registry of Historic Places and designated as a protected National Historic Landmark.[1] J.A., at 93, 103. The State Preservation Board is charged with preserving, maintaining, and promoting the cultural resources of the Capitol and its Grounds. Meeting the federal statutory definition of a "museum," 20 U.S.C. §9172, the Capitol and its Grounds are cared for by a professional curator,[2] who is given the duties of cataloguing and preserving their historical materials. TEX. GOV'T CODE §443.006.

Visitors to the Capitol may take a guided tour of the Capitol Building, which contains historic statues, portraits, and other artifacts, and they may also take a self-guided tour of the outdoor displays on the Grounds. J.A., at 27-29, 34-35, 67-71, 93-95, 163-72. The guided tour of the Capitol Building includes numerous memorials, plaques, and seals portraying both the religious and secular history of Texas. *Id.*, at 63-64, 163-72. For example, a large Six Flags Over Texas display on the floor of the

[1] The National Historic Preservation Program exists to preserve "for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. §461.

[2] By statute, "[t]he curator of the Capitol must have at least a master's degree and four years' experience in historic collections administration with a specialization in the material culture of this state." TEX. GOV'T CODE §443.006(a).

Capitol rotunda features the Mexican eagle and serpent – a religious symbol of Aztec prophecy[3] – as well as the Confederate seal inscribed with "Deo Vindice" ("God will judge"). *Id.*, at 63-67, 165-67. Likewise, visitors to the old Supreme Court Chambers, on the third floor of the Capitol Building, will find "Sicut Patribus, Sit Deus Nobis" ("As God was to our fathers, may He also be to us") inscribed above the Justices' bench. *Id.*, at 171-72.

Those wishing to tour the Grounds have access to brochures, laying out a self-guided tour, that the State Preservation Board makes available to Capitol visitors. *Id.*, at 35, 112, 204. The self-guided tour begins in the southeast portion of the Grounds, where the first monument encountered is a memorial to John B. Hood's Texas Brigade. *Id.*, at 115, 125. The tallest monument on the Capitol Grounds (at over forty-four feet in height), it is inscribed with quotes from Jefferson Davis and Robert E. Lee, and is topped by the bronze figure of a Confederate soldier. *Id.*, at 205. Moving north, the tour continues to the Texas Peace Officers memorial and the Disabled Veterans monument. *Id.*, at 117, 128-29.

The tour then crosses over to the Capitol's northwest quadrant, which contains seven of the Grounds' seventeen monuments. This area is the largest grouping of monuments on the Capitol Grounds. Three monuments honor

[3] In the center of the Mexican flag lies a brown eagle, eating a serpent while perched on a prickly-pear cactus, which grows from a rock surrounded by water. The Aztecs believed that their leaders were given this image in dreams by the Sun God Huitzilopochtli, as the site where they should found their theocratic capital Tenochtitlán. Founded in 1325 A.D., on a marshy island in Lake Texcoco, the city is the present-day site of Mexico City. *See* J.A., at 63, 162, 165. This religious display reflects a faith tradition found in Texas long before the arrival of the Jewish and Christian faiths. Indeed, the contribution of this Aztec mythology to Texas history and culture is such that it is taught in the Texas public schools in the fourth and seventh grades. *See, e.g.*, 19 TEX. ADMIN. CODE §113.6(a)(20) ("Culture. The student [is expected to] understand[ ] the contributions of people of various racial, ethnic, and religious groups to Texas."); *id.*, at §113.6(b)(1) ("History. The student [is expected to] understand the similarities and differences of Native-American groups in Texas and the Western Hemisphere before European exploration.").

veterans – a tribute to veterans of the Korean War (the largest monument in the northwest quadrant),[4] a tribute to veterans of World War I, bearing the inscription "God – Country – Peace," and a monument to Texans who died at Pearl Harbor. *Id.*, at 131-33. And four concern children – a replica of the Statue of Liberty in honor of the Boy Scouts of America (at nearly sixteen feet, the tallest monument in the northwest quadrant), *id.*, at 134; a tribute to the Texas Pioneer Woman, depicting a pioneer mother cradling a baby in one arm, *id.*, at 135; a tribute to Texas Children, portraying six children on a visit to the Capitol, one of whom wears a necklace bearing a small cross, *id.*, at 54, 136; and the Ten Commandments monument at issue in this litigation, donated by the Fraternal Order of Eagles and dedicated in 1961 "to the Youth and People of Texas," *id.*, at 87, 137.[5]

Continuing south, the tour passes monuments commemorating veterans of the Texas National Guard and the Spanish-American War, *id.*, at 139-40, and a Texas Cowboy statue paying tribute to the "rough and romantic riders of the range," *id.*, at 142, 206.

The self-guided tour ends at the "Great Walk," which connects the Capitol's main, south entrance with Congress Avenue and downtown Austin. *Id.*, at 37, 118-19, 145. Here visitors will find the four oldest monuments on the Grounds: a tribute to Heroes of the Alamo, which features a bronze statue of a Texan holding a muzzle-loader rifle, *id.*, at 147, 205; the Terry's Texas Rangers monument, commemorating volunteers who fought to defend the Confederacy, *id.*, at 146, 206; a memorial to Volunteer Firemen, inscribed with the names of Texan volunteers who have lost their lives fighting fires, *id.*, at 150, 206; and

[4] A massive block of granite, it stands over eleven feet in height and measures over nineteen feet in diameter; in contrast, the Ten Commandments monument is 6'3" high (plus a 6" base), 3'6" wide, and a mere 8" deep. Tr., at 17.

[5] Several other monuments bear the insignia of the State Star or Seal, *see, e.g.*, J.A., at 46-48, 51, 61, 64, 129, 132, 133, 135, 150; the Ten Commandments monument bears no such imprimatur, *see id.*, at 59-60, 137.

the Confederate Soldiers monument, in which five bronze figures represent the Infantry, Calvary, Artillery, and Navy, headed by the Confederate President Jefferson Davis, *id.*, at 153, 205.

A visitor to the Capitol Grounds cannot reach the Ten Commandments monument without first passing in full view of many of the Grounds' other monuments and memorial plaques. *Id.*, at 117. Notwithstanding Petitioner's erroneous statements to the contrary, Pet'r Br., at 3, 9, 29, 33, 34, 35,[6] six monuments are in the immediate vicinity surrounding the Ten Commandments monument, and several are easily visible. *See* Parts I.A.1., I.A.2.a., *infra*. When standing on the sidewalk facing the Ten Commandments monument, the Boy Scouts of America, Pearl Harbor, and World War I monuments – all abutting the same sidewalk – are visible to the left. *See* J.A., at 51, 117; *see also* Attachments A & B. And one need only turn in place for unobstructed views of the Bicentennial memorial plaque and Texas National Guard monument. J.A., at 117.

The Tribute to Texas Children and the Pioneer Woman monuments are the two monuments physically closest to the Ten Commandments, at distances of 111 feet and 120 feet, respectively. *Id.*, at 95. Although views of these monuments are obscured by hedges for a visitor standing immediately in front of the Ten Commandments monument, a few steps north brings the Pioneer Woman into view, and a few steps east toward the Capitol would allow the visitor to see the Tribute to Texas Children. *Id.*, at 117; *see also* Attachments A & B.

[6] Petitioner asserts incorrectly that "no other monument is visible from the Ten Commandments monument." Pet'r Br., at 3. Trial Exhibits 52, 53, and 61 show that the Statue of Liberty Replica, Pearl Harbor memorial, and World War I monument are all easily visible from the Ten Commandments monument. *See also* Attachments A & B. And the Capitol Monument Guide shows the Ten Commandments monument in close proximity to several other monuments and in the largest grouping of monuments on the Capitol Grounds. *See* J.A., at 204.

And, immediately above and to the right of the viewer is the frieze of the Capitol building itself, with the Six Flags of Texas, including the Aztec religious symbol of an eagle on a cactus with a serpent in its beak, and the Confederate flag, inscribed with "Deo Vindice" ("God will judge"). J.A., at 63-67, 154, 162, 165-67. And, atop the rotunda, stands the Goddess of Liberty. *Id.*, at 154.[7]

The Ten Commandments monument is one of the smallest monuments on the Capitol Grounds, and is dwarfed by the Capitol itself – built of the same red granite, the monument is difficult to see from many vantage points. *See* Attachment A.

The Ten Commandments monument came to the Capitol Grounds over forty years ago. In 1961, the Texas Chapter of the Fraternal Order of Eagles donated the monument "to the Youth and People of Texas," to be erected on the Capitol Grounds at the Eagles' expense. *See* Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195, 1195-96; J.A., at 97, 207. The Eagles are a service organization dedicated to promoting liberty, truth, and justice and claiming seven former United States Presidents as members.[8] To ensure that their monument would not be identified with any particular religious group, the Eagles carefully selected a nonsectarian text of the Ten Commandments that had been developed by representatives of the Jewish, Protestant, and Catholic faiths. *See*

[7] See STATE PRESERVATION BOARD, HISTORIC ARTIFACTS GALLERY, *at* http://www.tspb.state.tx.us/SPB/gallery/HisArt/19.htm (last visited Jan. 28, 2005) ("Standing nearly 16 feet tall and weighing approximately 2,000 pounds, the statue probably represents Pallas Athena, the Greek goddess of wisdom, justice, and arts and crafts. Athena, later called 'Minerva' in Roman mythology, served as the protectress of the democratic city-state of Athens in ancient times.").

[8] The Eagles' website claims Teddy Roosevelt, Warren G. Harding, Franklin D. Roosevelt, Harry S Truman, John F. Kennedy, Jimmy Carter, and Ronald Reagan as members. *See* FRATERNAL ORDER OF THE EAGLES, SEVEN U.S. PRESIDENTS HAVE BEEN MEMBERS OF THE FRATERNAL ORDER OF EAGLES, *at* http://www.foe.com/history/uspres.html (last visited Jan. 28, 2005).

State v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1017 (Colo. 1995).[9]

In accepting the gift from the Eagles and granting permission to erect the monument, the Legislature officially "congratulated" the Eagles "for [their] efforts and contributions in combating juvenile delinquency throughout our nation." J.A., at 97. Texas Representative Wil Smith and State Senator Bruce Reagan dedicated the monument. *Id.*, at 91. The legislative records from the time include no reference to anything religious, or any attempt to convey any sort of religious message, and there is no evidence that any members of the clergy participated in legislative deliberations or in the dedication ceremony. *Id.*, at 91, 97-100.

The Petitioner's brief accurately describes the physical characteristics of the monument itself.[10] A division of the State Board of Control, a predecessor to the State Preservation Board, recommended that the monument be erected on the northwest Capitol Grounds between the Capitol and the Supreme Court Building. *Id.*, at 33, 101-02. In its original orientation, the monument faced the back, or north, door of the Capitol. The text of the monument, however, would not have been legible from that vantage point, because of its relatively small size and distance from the building. *Id.*, at 91, 210-12. The monument requires virtually no maintenance. *Id.*, at 93.

In 1990, during construction of the underground Capitol Extension north of the Capitol, the monuments in the northwest quadrant (including the Ten Commandments monument) were removed from their customary

[9] The parties agreed that the district court could take judicial notice of the background facts relating generally to the Eagles' Ten Commandments monuments recounted in this case and in *Books v. City of Elkhart*, 235 F.3d 292, 294-95 (CA7 2000), *cert. denied*, 532 U.S. 1058 (2001). *See* Tr., at 32-34.

[10] There are a few typographical errors in Petitioner's transcription of the monument's text. The monument uses the word "shalt" eight times; Petitioner's brief renders three of these as "shall." Pet'r Br., at 2.

locations and stored. J.A., at 91-92. When the Extension was completed, the monuments were returned to their original locations. At the direction of the Curator, the Ten Commandments monument was turned toward the southwest instead of the southeast, so that it would face a newly-created sidewalk. *Id.*, at 50. A practical result of the change in the monument's orientation is that it is now "less conspicuous" in that its text is visible only to persons approaching the monument from the direction of the least-used, west entrance of the Capitol. *Id.*; *see also id.*, at 37, 204, 211.

In 1995 and 1996, the State Preservation Board undertook a project to restore the most historically important portions of the Capitol Grounds – areas to the Capitol's south, east, and west – to their condition as of 1915. *Id.*, at 49, 112. Monuments erected in those areas within fifty years after the restoration period – that is, after 1915 but before 1965 – were moved to the north side of the Grounds. *Id.*, at 49, 207. Monuments installed in the historic areas after 1965, like the Austin Lawyers' Wives' Star and the Realtors' Centennial Monument, were removed entirely and replaced with an explanatory plaque. *Id.*, at 77, 123, 138.[11] Since 1996, several new monuments have been added to the Grounds, all to the north of the Capitol. *Id.*, at 205-09. And, in 2001, the Legislature commissioned yet another monument to be added to the Capitol Grounds, "honoring [the] contributions of Tejanos" to Texas. Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473.

Although the Texas Ten Commandments monument had stood without incident or litigation since 1961, in January of 2002 Petitioner filed this lawsuit challenging the constitutionality of the monument. Applying this

[11] Because it is in the northeast quadrant of the Grounds – outside the traditional boundaries of the Historic Grounds, J.A., at 112 – the Disabled American Veterans of Texas monument, which was erected in 1980, was not removed during the 1995-96 renovation. *Id.*, at 208.

Court's decisions in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the district court upheld the monument, *Van Orden v. Perry*, 2002 WL 32737462 (W.D. Tex. Oct. 2, 2002), and the court of appeals unanimously affirmed, *Van Orden v. Perry*, 351 F.3d 173 (CA5 2003). To resolve the growing conflict among the courts of appeals, this Court granted certiorari. *Van Orden v. Perry*, 125 S.Ct. 346 (2004).

SUMMARY OF ARGUMENT

For over four decades, a granite monument depicting the Ten Commandments has stood on the Texas Capitol Grounds. Defined by statute as a "museum" and maintained by a professional curator, the Grounds feature seventeen different monuments to people, events, and ideals that have contributed to the diversity, culture, and history of Texas. The reasonable observer on the Capitol Grounds could no more miss this museum-like context than could a visitor standing on the National Mall in Washington, D.C. One of the smallest monuments, the Ten Commandments monument is located behind the Capitol and surrounded by six other monuments.

Under *Lynch* and *Allegheny*, the overall history, context, and surroundings are critical to determining a display's constitutionality. If, aware of that full background and history, the reasonable observer would not perceive the monument to be a government endorsement of religion, then the monument is constitutional. As the court of appeals unanimously found, the Texas monument easily meets that standard.

The effect of the monument, in the eyes of the reasonable observer, is merely a governmental acknowledgment of the substantial contribution of the Ten Commandments to the development of Western civilization and legal codes, a commemoration of one influence, among many, on who we are as a People. Although unquestionably a religious text, the Decalogue has also indisputably had a significant secular impact on our history and culture. And the monument's location on the Grounds, sitting between the Texas Capitol and Supreme Court, further communicates an acknowledgment of the Ten Commandments' secular impact on our legal institutions.

No history or evidence demonstrates an impermissible purpose. Rather, the Ten Commandments monument serves at least two secular purposes. First, it was accepted from the Fraternal Order of Eagles in 1961 for the purpose of commending their work with youth. Second, the monument was placed on the Grounds for the purpose of acknowledging the Ten Commandments' historical impact on American and Texan law and culture.

Moreover, the Ten Commandments' "history and ubiquity" further supports the monument's constitutionality. The Texas monument's forty-plus-year history on the Grounds, together with our rich national tradition of official acknowledgments of the Ten Commandments' impact on law, ensure that the reasonable observer would not conclude that the Ten Commandments monument on the Texas Capitol Grounds conveys a message of religious endorsement.

Countless monuments, medallions, plaques, sculptures, seals, frescoes, and friezes – including, of course, this Court's own courtroom frieze – commemorate the Decalogue. Nothing in the Constitution requires these historic artifacts to be chiseled away or erased. The Texas monument has neither the purpose nor effect of endorsing religion, and so, consistent with this Court's precedents, it should be upheld.

ARGUMENT

I. THE TEXAS TEN COMMANDMENTS MONUMENT, IN CONTEXT, WOULD NOT BE PERCEIVED AS AN ENDORSEMENT OF RELIGION, AND SO DOES NOT OFFEND THE ESTABLISHMENT CLAUSE.

The Court has long struggled with how best to judge the constitutionality of government displays with religious

content. The much-maligned *Lemon* test by its terms asks (1) whether the challenged state action has a secular purpose, (2) whether the primary effect of the state action advances or inhibits religion, and (3) whether the state action would result in excessive government "entanglement" with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[12]

Petitioner in *McCreary County v. ACLU*, No. 03-1693, and many of the *amici* in that case, and in this one, have urged this Court to alter or abandon *Lemon* altogether. The State of Texas does not dispute that it is well past time to dispatch that troubled test, but the Court need not do so to affirm the court of appeals in this case. Indeed, the Texas monument is altogether constitutional under existing Supreme Court precedent, and the monument can be upheld without altering settled law.

Since *Lemon*, the Court has distilled its first two prongs to mean that government may take no action that has the purpose or effect of endorsing or disapproving religion. *Allegheny*, 492 U.S., at 600-01; *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring). The Texas monument fully satisfies that standard.

"Endorsement" in the Court's discussions is not self-defining; it connotes "favoritism" or "promotion" and "prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S., at 593-94 (internal citation omitted). The endorsement test does not preclude governmental acknowledgment of religion, nor does it prohibit explicit governmental references to religion. *See id.*, at 601. Government "need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes

[12] The Court has not made use of *Lemon*'s third "entanglement" prong in government display cases, and Petitioner has agreed that entanglement is not an issue in this case. *See* 351 F.3d, at 177.

unduly into the affairs of the other." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion).

Instead, a government display has the purpose of endorsing religion if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S., at 593. In determining whether a government display has the effect of endorsing religion, the question is "what viewers may fairly understand to be the purpose of the display." *Id.*, at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). And that question is evaluated by the objective standard of the reasonable observer, deemed to be informed of the history and context of the display in question. *Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in the judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

Repeatedly, the Court has observed, "religion has been closely identified with our history and government," *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963); the "history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962); and we "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Indeed, there is "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674.

A governmental display will thus offend the Establishment Clause only when it is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("The message conveyed is one of endorsement of a particular

religious belief, to the detriment of those who do not share it.").

The question is not whether *any* nonadherent *might* perceive the display to reflect official disapproval of her religious choices. "Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Elk Grove United Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2321 (2004) (O'Connor, J., concurring in the judgment); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (declining to "employ Establishment Clause jurisprudence using a modified heckler's veto"). Instead, the question is whether the reasonable, objective observer – one acquainted with the display's origins, context, and "its place in our Nation's cultural landscape" – would perceive the display as an official endorsement of religion. *See Newdow*, 124 S.Ct., at 2322 (O'Connor, J., concurring in the judgment); *see also Pinette*, 515 U.S., at 779-80 (O'Connor, J., concurring in part and concurring in the judgment) (reasonable observer knows "the history and context of the community and the forum in which the religious display appears"); *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment) ("[C]ourts should assume that the 'objective observer,' . . . is acquainted with the Free Exercise Clause and the values it promotes.").

A. The Texas Monument, in Context and Considering Its History, Would Not Be Perceived by the Reasonable Observer as Impermissibly Endorsing Religion.

1. The context is not as Petitioner describes.

As an initial matter, Petitioner's brief seriously misrepresents the actual context of the Texas monument. Repeatedly, Petitioner makes factual statements that are unsupported by the record and contrary to reality. These misstatements include:

- Asserting, no less than six times, that "no other monument is visible from the Ten Commandments monument." Pet'r Br., at 3; *id.*, at 9, 29, 33, 34, 35. This assertion is simply wrong. *Four* separate monuments are easily visible from the monument, and two others (the two closest, standing 111 and 120 feet away) are visible if one takes but a few steps to see beyond a hedge. *See* Part I.A.2.a., *infra*; *see also* Attachment A.
- Asserting, four times, that "[n]o other monument on the Capitol's grounds expresses a religious message." Pet'r Br., at 4; *id.*, at 9, 29, 34. This assertion is also incorrect. The closest monument to the Ten Commandments monument, the Tribute to Texas Children, displays a young girl wearing a cross. J.A., at 54. The Veterans of World War I memorial, right down the sidewalk, is inscribed "God – Country – Peace." *Id.*, at 132. The Aztec symbol of the eagle on cactus, which Petitioner dismisses as being "inside the Capitol," Pet'r Br., at 36, is also displayed on the frieze outside the Capitol, almost directly above the Ten Commandments monument. J.A., at 154, 162. Alongside that seal on that same frieze, is the Confederate flag, inscribed with "Deo Vindice" ("God will judge"). *See Id.*, at 63-67, 154, 165-67. Above them both, is the Goddess of Liberty. *See* note 7, *supra; J.A.*, at 154.
- Asserting that the monument is "directly in front of the Texas State Capitol," "prominently displayed" on "the 'Great Walk.'" Pet'r Br., at 30. This, too, is false. The monument is *behind* the Capitol, between its back door and its least-used western entrance. J.A., at 37-38, 87. The Great Walk is, indeed, in front of the Capitol, leading up to its main southern entrance. *Id.*, 112-20, 145 ("The promenade leading from Congress Avenue to the Capitol's south entrance is called the Great Walk.").

But the monument is nowhere near the Great Walk. *Id.*, 112-20. Instead, what Petitioner describes as the "Great Walk" is in fact a driveway where Capitol staff park their cars.[13]

- Asserting that "[n]ot every monument removed during the construction was replaced after being taken down," but "the State Preservation Board decided to place the Ten Commandments monument back in its prior location, but turned it to face in a different and more prominent direction: directly facing the corner of the two sidewalks that intersect in front of the Texas State Capitol and the Texas Supreme Court." Pet'r Br., at 5. This is wrong in several respects. First, the Board replaced every monument after the 1993 construction. *See* Part I.B.3., *infra*; J.A., at 49, 77, 112. Second, the new position is not more "prominent." As noted, it is not "in front" of the Capitol, and there is no "*the* sidewalk" connecting the Capitol and the Supreme Court. There are multiple sidewalks, and the monument is on the least used pathway. *Id.*, at 37-38, 87. And third, the monument was turned *away* from the Capitol, rendering it "less conspicuous" and orienting it to face the newly-constructed sidewalk that had not existed before. *Id.*, at 50.
- Asserting repeatedly, and incorrectly, that the monument is "large," "prominent," and even "uniquely prominent." Pet'r Br., at i, ii, iii, 1, 2, 6, 18, 22, 27, 29, 30, 44. The facts and the record are to the contrary. *See, e.g.*, J.A., at 87 ("Well, it's certainly one of the smallest monuments that we have. It's not in the most prominent location. . . . It's at the north door, which is less used."); *see also* Attachment A.
- Asserting that "[a]n individual must pass through gates, many of which are guarded, to gain access to the State Capitol grounds." Pet'r Br., at 31. While this might be true at other state Capitols, it is not true at the Texas Capitol. Although there are ceremonial gates at several points around the Capitol, one may enter the Grounds from many directions without passing through gates or encountering guards. *See, e.g.*, Attachment A.
- And asserting that "Texas chose the Protestant, King James version of the Ten Commandments for its monument." Pet'r Br., at 42. Texas did not "choose" any version, as the record is clear that the Eagles themselves selected the text. J.A., at 97. The text is not in fact the King James version; indeed, as Petitioner omits to acknowledge, the Eagles chose the text only after convening representatives of Catholic, Protestant, and Jewish faiths and charging them with arriving upon a nonsectarian version of the Commandments. *See Freedom from Religion Found.*, 898 P.2d, at 1017; Tr., at 32-34.

The consequences of Petitioner's misimpression about the facts of the monument and its surrounding context are not merely that his recitation of the case was less than accurate. Indeed, his entire legal argument is explicitly predicated upon a series of false premises, without which it cannot survive.

He postulates a "large," "uniquely prominent" religious monument, "in front" of the Capitol on "the Great Walk," situated "by itself" so that "no other monuments [are] visible when standing before it." Pet'r Br., at 1, 44,

[13] Petitioner may have confused the Great Walk with the Oval Walk. The former is "one of the most significant features of the Capitol grounds," lined with trees and the oldest and largest Capitol monuments, J.A., at 144, 145; the latter is a paved pathway around the Capitol, *id.*, at 113. In any event, the Ten Commandments monument is not adjacent to the Oval Walk either – it abuts a sidewalk and then a driveway used for parking (across which is found the Oval Walk). *See* Attachment B.

30, 29. That monument does not exist, at least not in Texas. And so his lengthy exegesis as to whether a Ten Commandments monument, in that hypothetical context, might be constitutional, has little bearing on this Court's inherently fact-specific and context-sensitive analysis under the Establishment Clause. *See Lynch*, 492 U.S., at 629 (O'Connor, J., concurring) ("[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice. . . . ").

2. The actual context does not convey endorsement.

a. The museum setting of the Capitol Grounds precludes a perception of religious endorsement.

The reasonable observer does not focus exclusively on the religious component of a governmental display, but instead views the display in its full context. *See Lynch*, 465 U.S., at 679-80. In *Lynch*, the Court upheld the Rhode Island City of Pawtucket's display of a crèche in its "proper context of the Christmas Holiday season." *Id.*, at 680. This "overall" setting did not diminish the crèche's religious significance, but it ensured that the display's effect would not reasonably be perceived as endorsement, in the same way that "a typical *museum setting*, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.*, at 692 (O'Connor, J., concurring) (emphasis added). The Capitol Grounds, as a whole, form the proper context in which to determine the effect of the Ten Commandments monument upon a reasonable observer.[14] And this overall, museum setting precludes any reasonable perception of official endorsement of the monument's religious content.

[14] This is especially true in this instance because it would be virtually impossible for a person to enter the Capitol Grounds and encounter the Ten Commandments monument without first passing several other monuments. *See* J.A., at 117.

The Capitol and its Grounds constitute, as a whole, a National Historic Landmark. J.A., at 103-11. The State Preservation Board is charged with preserving this landmark, and to that end it employs professional curators with degrees in history and museum science. *Id.*, at 21, 28-29. The Board offers educational programs, including guided tours of the Capitol building and brochures. *Id.*, at 20-24, 112, 204. Indeed, the Capitol and its Grounds literally qualify as a museum as defined by federal statute. *Id.*; 20 U.S.C. §9172.

Just as an observer standing on the National Mall in Washington, D.C. – surrounded by its many monuments to our Nation's heritage – could not miss the museum-like setting, neither could the reasonable observer standing on the Texas Capital Grounds. The entire Grounds are meticulously maintained and clearly set apart from the surrounding city. *See* J.A., at 204; STATE PRESERVATION BOARD, CURRENT PHOTOS GALLERY, *at* http://www.tspb.state.tx.us/SPB/Gallery/CurrPhoto/6.htm (last visited Jan. 28, 2005).[15] The Grounds are dominated by the Capitol itself and the aptly-named Great Walk leading up to the Capitol's south entrance, *see* J.A., at 118-19, 204; STATE PRESERVATION BOARD, CURRENT PHOTOS GALLERY, *at* http://www.tspb.state.tx.us/SPB/Gallery/CurrPhoto/6.htm (last visited Jan. 28, 2005), along with the Great Walk's four towering monuments. *See* J.A., at 146-47, 150, 153, 204; STATE PRESERVATION BOARD, CURRENT PHOTOS GALLERY, *at* http://www.tspb.state.tx.us/SPB/Gallery/CurrPhoto/4.htm (last visited Jan. 28, 2005).

The Ten Commandments monument – one of the smallest on the Grounds[16] – occupies a far less prominent

[15] *See also* Trial Exhibit 44 (an unnarrated video tour of the Capitol Grounds).

[16] The Ten Commandments monument is slightly more than one-third the height of the Boy Scouts of America monument – visible just down the sidewalk – and its width is roughly one-sixth the diameter of the nearby Korean War monument (its depth is only one-twenty-ninth that diameter). Surveying the entire Capitol Grounds, Hood's monument is

(Continued on following page)

position, along with its six surrounding monuments, to the Capitol's northwest. J.A., at 87, 204; *see also* Attachment A. No matter the route taken, the Ten Commandments monument cannot be reached without passing in full view of other monuments on the Grounds, and, contrary to Petitioner's repeated assertion, *see* Pet'r Br., at 3, 9, 29, 33, 34, 35, no fewer than four additional monuments are easily visible to a visitor standing on the sidewalk in front of the Ten Commandments monument.[17]

This overall context is so unmistakable that Petitioner stipulated to the fact that the "Ten Commandments monument is one element of a legally-protected National Historic Landmark." J.A., at 93. Petitioner thus correctly states that no observer could fail to understand "that the government is responsible for [the monument] being on government property." Pet'r Br., at 31. He is wrong, however, to assert that a reasonable observer would perceive in the monument a message of religious endorsement.

In *Allegheny*, the Court found a message of endorsement in a large crèche, sitting alone on the main and most beautiful part of a county courthouse, highlighted by a floral frame, bearing the exclusively religious admonition "Glory to God in the Highest," with a sign indicating its ownership by a religious organization. 492 U.S., at 598-600. The display challenged here, by contrast, is one of seventeen monuments on the Texas Capitol Grounds commemorating people, ideals, and events that have helped to shape Texan identity. *See* Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473. It is one of the smallest of those seventeen monuments, J.A., at 87, sits in a relatively inconspicuous position by the least-used entrances to the Capitol, *id.*, at 37, 87, is not highlighted

over thirty-seven feet taller than the Ten Commandments monument, and the Capitol itself (at 310 feet) towers above. *See* Attachment A.

[17] The Boy Scouts of America, Pearl Harbor, and World War I monuments are all visible along the same sidewalk, and the National Guard monument is visible behind the Ten Commandments monument. *See* J.A., at 51, 117, 204; Trial Exhibit 64; Attachments A & B.

among the monuments in any way, *id.*, at 212, bears a notation indicating its dedication by a private service organization, *id.*, at 137, and is inscribed with a text that, while religious in origin and content, has had an important secular impact on our law and culture.

In its museum-setting context, this monument would not convey to the reasonable observer any official endorsement of religion. This is simply not a context in which the State is reasonably understood to be taking sides. The many monuments commemorating veterans do not communicate disapproval of pacifists; the Tribute to Children does not reflect negatively on older Texans; the Hiker and horse-riding Cowboy monuments send no message concerning motorized transport; and the Volunteer Firemen monument reflects no official disapproval of those who pursue firefighting as a paid profession. The monuments, memorials, and commemorative plaques on the Capitol Grounds are not reasonably perceived as creating "insiders" and "outsiders" in the Texas political community. *See Lynch*, 465 U.S., at 688 (O'Connor, J., concurring).

Indeed, several monuments on the Capitol Grounds commemorate aspects of the Confederacy, a topic which, understandably, can arouse significant passions and resentments. But, even in that sensitive context, the reasonable observer would not perceive those monuments as a governmental statement of current allegiance to the Confederacy, or a present desire to secede from the Union. Instead, the reasonable observer would rightly understand that the Confederacy is part of the history of Texas, and our Nation, and these century-old monuments simply acknowledge and commemorate that fact. Just so, the Ten Commandments monument is not a government endorsement of the Decalogue, but rather an acknowledgment and commemoration of the role of the Ten Commandments in our history and culture.

All of these monuments and memorials send a clear civic message acknowledging historically important people, ideals, and events. These displays "document the struggles

and the successes that Texans have experienced in the past" and serve to inspire Texans as they "face the challenges of today." Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473. Like the Grounds' other monuments, the Ten Commandments monument is reasonably perceived as sending a message acknowledging the historic significance of its subject matter.

b. The monument's placement between the Texas Capitol and Supreme Court highlights its civic message.

The Ten Commandments constitute an ancient legal code with historically distinct religious, moral, and civic dimensions. The message sent by their display may thus prove even more highly dependent upon context than for other religious symbols – the Decalogue's display may well deliver qualitatively different messages in a church, in a school, or in a courthouse. *Cf. Stone v. Graham*, 449 U.S. 39, 41 (1980) (Ten Commandments posted in school); *City of Elkhart v. Books*, 121 S.Ct., 2209, 2212 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (Ten Commandments monument near municipal building). Here, the Ten Commandments monument sits on the Capitol Grounds on a line between the Texas Capitol and Supreme Court. J.A., at 95, 204, 211-12. "Considered in that setting, the monument does not express the [State's] preference for particular religions or religious belief in general. It simply reflects the Ten Commandments' role in the development of our legal system." *Books*, 121 S.Ct.. at 2212 (Rehnquist, C.J., dissenting from denial of certiorari).

Petitioner's argument that a large crèche permanently installed in place of the Ten Commandments monument would send a message of endorsement, *see* Pet'r Br., at 40, whether right or wrong, only highlights the importance of context to the endorsement analysis. A depiction of the birth of Jesus, commonly associated with the Christmas holiday, would indeed seem out of place permanently situated between the State's key legal institutions. Not so

for a monument bearing an ancient legal text, commonly associated with the idea of fundamental principles and historically understood to have had a significant impact on the development of our law. Such a monument has a natural home sitting between buildings housing the Texas Legislature and Texas Supreme Court.

Thus the reasonable observer, knowing the context of the specific and deliberate location of the Ten Commandments monument on a line between the Capitol and the Supreme Court, would rightly perceive that it is the civic aspect of the Ten Commandments' contributions to legal history and development that is being singled out and acknowledged.

3. The monument's content is reasonably perceived to deliver a civic message, not a religious one.

a. The monument contains civic symbols.

The monument does not rely exclusively on its context to negate any possible message of religious endorsement; its design also highlights the Ten Commandments' civic significance. The reasonable observer viewing the monument cannot miss the distinctive symbols introducing the monument's text. Centered at the monument's top, an eye within a triangle emanates rays of light. Below this eye hovers an eagle, wings outstretched, grasping the stars and stripes of the American flag. Below the eagle, written in the monument's largest letters, are the words, "the Ten Commandments." Underneath is written, "I AM the LORD thy God." The following text is in smaller font, with the Commandments justified to the left. J.A., at 137.

How would the reasonable observer interpret this combination of symbols and words? The striking "all-seeing eye" would doubtless seem familiar – as Petitioner notes, the eye at the monument's head is "similar to the symbol on the one-dollar bill." Pet'r Br., at 31. But the similarity between the monument's array of introductory symbols and those of our most basic unit of currency does

not end there. Along with an eye within a triangle emanating rays of light, set in a circle to the left, the back of our one-dollar bill contains a depiction of an eagle, wings outstretched, surrounded by stars and stripes, set in a circle to the right. These represent the sides of the Great Seal of the United States. J.A., at 179-83. In between these symbols, in the largest lettering on the bill, is the word "ONE," reflecting the note's content and value. Just above that word, in smaller font, are printed the words "IN GOD WE TRUST." *See* BUREAU OF PRINTING AND ENGRAVING, *at* http://www.moneyfactory.com/document.cfm/5/43/135 (last visited Jan. 28, 2005).[18]

This line-up of words and symbols on the dollar bill – all-seeing eye, eagle with stars and stripes, the words "ONE" and "IN GOD WE TRUST" – is strikingly similar to the prefatory line-up on the monument – all-seeing eye, eagle with stars and stripes, the words "the Ten Commandments" and "I AM the LORD thy God." The reasonable observer would not likely find this confluence of words and symbols insignificant. Instead, she would reasonably perceive in the design the message the monument's designers no doubt intended to send: like the motto on our currency, the Ten Commandments are presented here for their civic, and not for their religious, significance.

The words "IN GOD WE TRUST" have an undeniably religious meaning. Printed next to our national symbols on our legal tender, however, they are rightly understood not as an endorsement of religion, but as a civic acknowledgment of our religious heritage. *See Lynch*, 465 U.S., at 676. The Ten Commandments also have an undeniably religious aspect. Inscribed beneath these same national symbols, and situated near the State's key legal institutions, however, the monument bearing this text is rightly understood not as an endorsement of religion, but as a

[18] Above the eye on the Great Seal and dollar bill are also written the words "annuit coeptis," commonly translated as "God has favored our undertakings." *See* J.A., 181-82. Dollar bills have contained these symbols since 1957.

civic acknowledgment of this religious text's impact on our heritage.

b. The monument's text is not reasonably perceived to reflect official state policy.

The monument's text is framed with symbols highlighting the Decalogue's civic dimension. Turning to the text of the Ten Commandments themselves, the reasonable observer would not believe that the State of Texas was endeavoring to endorse these propositions as official State policy. It is not at all clear how, standing in the midst of the Capitol Grounds's many stone monuments, an observer would reasonably understand the State to be officially endorsing the command, "Thou shalt not make to thyself any graven images." J.A., at 137. Nor is it clear how an observer would reasonably understand the State to be endorsing the command to "Remember the Sabbath day, to keep it holy." *Id.* For example, no one would reasonably think that the State has adopted a position, one way or the other, on whether the Dallas Cowboys should continue playing professional football on Sundays or whether the Texas Longhorns should continue playing college football on Saturdays (notwithstanding the seriousness, and even religious fervor, with which Texans approach their football, it would be a stretch to describe the game as "holy").

Indeed, the distinction between acknowledgment and endorsement is clearer here than it was concerning the national motto, pledge, or the crèche displayed in *Allegheny*. When the government says, "IN GOD WE TRUST," or that we are a Nation "under God," *see Newdow*, 124 S.Ct., at 2306, or "Glory to God in the Highest," *see Allegheny*, 492 U.S., at 598, it makes an affirmative, first-person pronouncement with religious content. In contrast, the reasonable observer could not mistake the words "I AM the LORD thy God" as an affirmative, first-person pronouncement of the State of Texas – instead, the Ten

Commandments speak for themselves.[19] This is more reasonably understood as an acknowledgment of an historically significant "cultural phenomenon" than an official government "suggest[ion] that people praise God." *See Allegheny*, 492 U.S., at 601.

Petitioner notes that no one could doubt that a law imposing the first four commands would violate the Establishment Clause. *See* Pet'r Br., at 24. But, rather than proving an effect of religious endorsement, Petitioner's observation strengthens the argument that the reasonable observer would not think that Texas was endorsing these commands in a manner that could have any impact on her personal standing in the community. The reasonable observer is not likely to mistake these commands for official statements of Texas policy, any more than the reasonable observer would deem the artistic portrayal of the Last Supper in the National Gallery of Art[20] as an official command to partake in Holy Communion. Instead, she is likely to take the commandments for what they are: a religious text and an ancient legal code that, as a whole, have had an historically significant impact on our law and culture. That is simply the "common sense of the matter." *Zorach*, 343 U.S., at 312.[21]

[19] Each of the preceding (presumably constitutional) examples is directory and seeks to characterize the nature and identity of the entire polity ("in God *we* trust," "I pledge allegiance to . . . one nation under God"). In contrast, the language of the Ten Commandments is an historic text, not a governmental edict or characterization of identity.

[20] *See* NATIONAL GALLERY OF ART, THE COLLECTION, *at* http://www.nga.gov/cgi-bin/pinfo?Object=12135+0+none (last visited Jan. 28, 2005).

[21] Following the Ten Commandments' text are three additional symbols: two small stars and the superimposed Greek letters Chi and Rho. J.A., at 137. The reasonable observer would perceive in these Jewish and Christian symbols an acknowledgment of the Ten Commandments' historical connection with both of these faith traditions. And, by displaying side-by-side symbols from two separate faiths, the monument diminishes any perception that one particular faith is being singled out or favored.

4. The monument's history reinforces its civic message.

The reasonable observer would also be familiar with the monument's history. *See Newdow*, 124 S.Ct., at 2322 (O'Connor, J., concurring in the judgment). This observer would thus be aware that a private service organization had asked the State and was granted permission, over forty years ago, to erect the monument on the Capitol Grounds. J.A., at 97. She would know that the monument's text had been developed, on behalf of this service organization, by representatives of the Jewish, Protestant, and Catholic faiths to ensure that it would not be identified with any particular religious group. *See Freedom from Religion Found., Inc.*, 898 P.2d, at 1017; Tr., at 32-34. She would know that the monument had stood in Austin – a hotbed of litigation and home to the late Madalyn Murray O'Hair, founder of American Atheists – for some forty years without generating any controversy or litigation. *See* 351 F.3d, at 181.[22] Nothing in the monument's history could lead her to conclude that it was intended to or did in fact send a message of religious endorsement. On the contrary, the monument's history reinforces the perception of the same message suggested by its context and content – a message highlighting the Ten Commandments' historically significant civic impact.

B. The Monument Serves the Secular Purposes of Honoring the Eagles and Acknowledging the Ten Commandments' Historical Impact on the Development of Western Law and the Culture and Diversity of Texas.

For Petitioner to prevail on purpose grounds, he must demonstrate that the erection of the Ten Commandments

[22] *See also Lynch*, 465 U.S., at 693 (O'Connor, J., concurring) ("It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit.").

monument was "motivated *wholly* by religious considerations." *Lynch*, 465 U.S., at 680 (emphasis added). And, he must show that those considerations were constitutionally impermissible. A government's purpose need not "be unrelated to religion – that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (internal citation omitted). Instead, the Court's purpose test "aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* In short, Petitioner must demonstrate that the State's actual purpose in accepting the monument was to endorse religion. *See Wallace*, 472 U.S., at 56; *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring).

The State, on the other hand, needs only a single legitimate secular purpose for the display to satisfy this requirement. *See Lynch*, 465 U.S., at 681 n.6. The Court's inquiry into the State's purposes is by design deferential and limited, *see Wallace*, 472 U.S., at 74-75 (O'Connor, J., concurring in the judgment), and the Court is reluctant to attribute unconstitutional motives to the State, *see Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Even in the absence of any expressed secular purpose, the State should not be deemed to have acted with an improper purpose unless "it is beyond purview that endorsement of religion or a religious belief 'was and is the [display's] reason for existence.'" *Wallace*, 472 U.S., at 75 (O'Connor, J., concurring in the judgment) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968)).

1. A monument can be both religious and secular.

Texas does not dispute that the Ten Commandments are a sacred religious text, believed by several major religions to have been scripted by the hand of God Himself. But,

in addition, the Ten Commandments have had an important and undeniable secular impact as well.

In contrast, Petitioner advances an oddly unitary view of the commandments: "They are not secular; they express a religious faith and vision." Pet'r Br., at 10. As a matter of logic, the former does not flow from the latter. It is true that they are not *exclusively* secular; but that does not mean that they have not had important secular ramifications over the centuries. *See* Part I.B.4, *infra*.

And, under this Court's precedents, the burden is placed on Petitioner to prove that the State's exclusive purpose was religious endorsement, and not on the State to prove that its exclusive purpose was secular. *See Lynch*, 465 U.S., at 680 (purpose test satisfied where there was "insufficient evidence to establish . . . a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message").

As Justice O'Connor explained in *Lynch*, there,

> "[t]he [district] court *found as facts that the crèche has a religious content*, that it would not be seen as an insignificant part of the display, that its religious content is not neutralized by the setting, that the display is celebratory and not instructional, and that the city did not seek to counteract any possible religious message. These *findings do not imply that the crèche communicates government approval of Christianity*." 465 U.S., at 693 (emphasis added).

Just so, neither do the undeniable religious aspects of the text of the Ten Commandments "imply that the [monument] communicates government approval of Christianity."

2. The monument was accepted in 1961 for the secular purpose of honoring the Eagles.

Petitioner erroneously suggests that it is "impossible" to find an actual purpose that is secular because there is "no record" of the legislative history. Pet'r Br., at 20. His

quotation of the parties' stipulation omits the second half: Although it is true that there is no record of "any discussion" or floor debates, "[t]he legislative history . . . is comprised entirely of the House and Senate Journal Entries." J.A., at 91. And those entries speak for themselves:

> "RESOLVED, . . . that the Fraternal Order of the Eagles of the State of Texas be commended and congratulated for its efforts and contributions in combating juvenile delinquency throughout our nation and be granted permission to have this granite monolith placed on the grounds of the State Capitol of Texas." Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195, 1195-96; J.A., at 97.

On its face, the record demonstrates a secular purpose in displaying the monument: to honor the contributions of the Eagles for their work with youth. The District Court reasonably found, and the Fifth Circuit rightly affirmed, that this resolution demonstrated a secular intent "to recognize and commend a private organization for its efforts to reduce juvenile delinquency." 351 F.3d, at 178.

In an attempt to get around this demonstrably secular purpose, Petitioner is forced to argue that the Legislature's joint resolution was, in fact, a sham. And, here, the lack of additional legislative history renders Petitioner's burden all but insurmountable. Unlike other cases where various lower courts have found impermissible religious purposes, in this case, there is no evidence of public speeches or proclamations by government officials of any intent to further religion; there is no evidence of any involvement of clergy whatsoever in the dedication of the monument; and there is no evidence of any desire to exclude any religious group at all from acceptance in the public sphere. *Cf. Books*, 235 F.3d, at 306.

As a result, Petitioner is reduced to asserting that the Legislature's stated purpose "strains credulity" for two reasons. Pet'r Br., at 21. First, Petitioner argues, there is "almost no reference to juveniles. . . . The monument itself says nothing about the issue." *Id.* This contention is

refuted by the face of the monument itself, which proclaims that it was "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES 1961." J.A., at 137.

Second, Petitioner contends, the Legislature's purpose was a sham because "accepting a gift from an organization is a dubious way of honoring it." Pet'r Br., at 21. But, as the Fifth Circuit recognized, Texas has a record of accepting monuments as a means of honoring the monuments' donors. Ten years before accepting the Ten Commandments monument from the Eagles, the Texas Legislature authorized the installation of the Statue of Liberty Replica in order to "honor the Boy Scouts of America," who had offered the monument to the State. Tex. S. Con. Res. 4, 52d Leg., R.S., 1951 Tex. Gen. Laws 1495, 1495. This purpose was not a sham in 1951, nor was it a sham in 1961.

From these two false factual postulates, Petitioner then suggests an incorrect legal metric: "acknowledging the Fraternal Order of Eagles . . . [can] hardly be said to be *the* reason that the State posted the Ten Commandments. . . . " Pet'r Br., at 22 (emphasis added). The State need not demonstrate that it was *the* reason; *a* reason will suffice. Petitioner, on the other hand, must demonstrate that the monument was "motivated *wholly* by religious considerations." *Lynch*, 465 U.S., at 680 (emphasis added). That, he cannot do.

3. Returning the monument after Capitol renovations were complete, and turning it to face a newly constructed sidewalk, did not demonstrate an impermissible religious purpose.

Petitioner argues that the relevant timeframe is not 1961, but rather 1993, because in that year, after a two-year Capitol renovation project, the Preservation Board returned the monument to its location and changed the direction in which it faced. *See* Pet'r Br., at 22. This argument is without merit.

When the Ten Commandments monument was originally installed in 1961, only one sidewalk connected the Supreme Court building and the Capitol, leading from the Court to the Capitol's north entrance. The monument, placed on a line between these buildings, abutted the driveway circling the Capitol, but not this sidewalk. *See* J.A., at 91, 102. In 1990, construction began on a new underground Capitol Extension, which required excavation of much of the Grounds' northwest quadrant. Along with the other monuments in the area, the Ten Commandments monument was therefore placed in storage for its protection until the project's completion, and returned to its original location in 1993. *See* J.A., at 91-92. As part of the Capitol Extension project, an additional sidewalk was installed leading from the Court to the Capitol's west entrance. *See* J.A., at 50, 204. Had the monument been replaced in 1993 with the identical orientation, it would have been positioned near this new sidewalk, but facing away from it. Therefore, the Board made the unremarkable decision to rotate the monument to face the new sidewalk. *Id.*

None of this evinces any impermissible intent whatsoever. The desire to complete a Capitol construction project – and the desire to restore the status quo ante after completion by returning the monuments that were temporarily removed – is indisputably secular. Indeed, there is no evidence that the State Preservation Board even considered religious matters, much less was motivated "wholly" by such concerns.

Petitioner's sole basis for his inference to the contrary is his statement that "other monuments that were removed at the same time were never put back on display." Pet'r Br., at 22. That statement, however, is incorrect. No monuments were permanently removed in connection with the Capitol Extension project. What Petitioner is no doubt thinking of is the restoration project of 1995-1996, two years later. At that time, when the State Preservation Board was restoring the most historic portions of the Grounds, Petitioner is correct that some monuments were removed. But, in the interest of historical fidelity, the

Board then decided to retain every monument that was erected before 1965, and remove every monument erected thereafter. *See* J.A., at 49, 77, 123, 138. That historical renovation project, likewise, reveals no impermissible religious purpose.

4. The monument also serves to acknowledge the Ten Commandments' impact on law and culture.

Petitioner does not deny that the Texas Legislature's intent to acknowledge the Eagles "may have coincided with the acceptance of the gift," but he insists that the monument's placement on the Capitol Grounds also reflects a purpose related to "the content of the monument, the Ten Commandments." Pet'r Br., at 22. Respondents agree that the monument's placement provides evidence of a governmental purpose with respect to the monument's content. But its placement on the Grounds does not suggest an intent to endorse, favor, promote, or take sides on questions of religious belief. Instead, it suggests an intent to recognize that the Ten Commandments have made a contribution to our society that is worthy of appreciation. *Cf. Lynch*, 465 U.S., at 693 (O'Connor, J., concurring) (Government acknowledgments of religion can serve to encourage "recognition of what is worthy of appreciation in society.").

Indeed, the Texas Legislature has described the Grounds' monuments as commemorating "people, ideals, and events that compose Texan identity." Tex. H.R. Con. Res. 38, 77th Leg., R.S., 2001 Tex. Gen. Laws 6473. Placing the Ten Commandments monument on the Capitol Grounds thus reflects a purpose to acknowledge and commemorate the culturally significant role the Ten Commandments have played in shaping Texan identity. In addition, evidence that the monument was deliberately installed on a line between the Texas Supreme Court and Capitol suggests an intent to highlight the Ten Commandments' impact on the State's legal institutions. *See* J.A., at 33-34, 91, 101.

While the Ten Commandments are undeniably religious in origin, they have also undoubtedly had a significant impact on our law and culture. Acknowledging that impact is a legitimate secular purpose. *See, e.g,* JOHN T. NOONAN, JR., THE BELIEVERS AND THE POWERS THAT ARE 4 (1987) ("Little doubt exists that, despite the great variety of views on the dating, numbering, and exact meaning of the Ten Commandments, they have been the most influential law code in history."). Texas's recognition of the Ten Commandments' role in the development of our legal systems is a matter of history, not religion.

The Ten Commandments have been linked with the common law at least since Alfred the Great placed them at the beginning of his Book of Dooms in the Ninth Century. *See* LAWS OF KING ALFRED, *reprinted in* F.L. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 62-93 (1963); *see also* HAROLD J. BERMAN, LAW AND REVOLUTION 65 (1983). Seven hundred years later, the most prominent jurists of the Protestant Reformation produced systematic legal treatises "basing the various branches of the law on the Ten Commandments." Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 745-46 (2000).[23] The Decalogue's strong influence on centuries of

[23] Professor Berman writes: "As Roman Catholic jurists had systematized the canon law on the basis of the sacraments, so Lutheran jurists used Melanchthon's topical method in basing the various branches of the law on the Ten Commandments. Thus Johann Oldendorp, whose principal treatise three centuries later was in the library of our Supreme Court Justice Joseph Story, founded criminal law on the commandment 'Thou shalt not kill,' property law on the commandment 'Thou shalt not steal,' family law on the commandment 'Thou shalt not commit adultery,' the law of contract and delict on the commandments 'Thou shalt not bear false witness' and 'Thou shalt not covet.' . . . These were 'topics' not only in the sense of categories or headings but also in the sense of general principles – theologically based moral principles in light of which subordinate species of legal rules were to be interpreted. This was a new method of legal synthesis which transcended the earlier divisions among co-existing legal systems within the same polity." *Id.*; *see also* John Witte, Jr., *The Civic Seminary: Sources of Modern Public*

(Continued on following page)

Western law was in turn reflected in the legal and political theories of the religious refugees arriving on the New World's shores in the Seventeenth Century – and they deliberately enacted many, and sometimes all, of the Ten Commandments into their nascent Colonies' legal codes. *See generally Amicus* Br. of Wallbuilders, Inc. in *McCreary County v. ACLU*, No. 03-1693. Three hundred years later, at the dawn of the Twentieth Century, "it continued to be widely believed, at least in the United States . . . [that] divine law, especially the Ten Commandments," was one of "the ultimate sources of positive law." Berman, *The Western Legal Tradition*, *supra*, at 751.

Thus, over a millennium of history belies Petitioner's passing strange comment that "the Ten Commandments are not a special source for the American legal rules." Pet'r Br., at 25. Indeed, the courts have routinely concluded to the contrary. *See, e.g., Freethought Soc'y v. Chester County*, 334 F.3d 247, 267 (CA3 2003) (Ten Commandments "are regarded as a significant basis of American law and the American polity"); *Books*, 235 F.3d, at 302 ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 34 (CA10 1973) (Ten Commandments are "a foundation for law" and "historically important"); *Freedom from Religion Found., Inc.*, 898 P.2d, at 1024 ("[T]he Ten Commandments

Education in the Lutheran Reformation of Germany, 12 J.L. & RELIGION 173, 176 (1995-1996) ("Lutheran theologians introduced the concept of the magistrate as the ["father of the community"], called by God to enforce both tables of the Decalogue in the community."); John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433, 451 (1993-1994) ("[E]arly modern jurists" believed that the "laws which [authorities] promulgate must encapsulate and elaborate the principles of God's moral law, particularly as set out in the Ten Commandments."); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1162-63 (1994) ("Protestants looked to the Bible, and especially the Ten Commandments, as the ultimate source of the content of natural law.").

has served over time as a basis for our national law."); *see also City of Elkhart v. Books*, 121 S.Ct., at 2211 (Rehnquist, C.J., dissenting from denial of certiorari) (Ten Commandments "have made a substantial contribution to our secular legal codes").[24]

At the time of our Nation's founding, the Ten Commandments were widely understood to have three distinct uses or dimensions – religious, moral, and civic. *See* Witte & Arthur, *The Three Uses of the Law*, *supra*. Indeed, "[t]wo philosophers of Anglican connection, Thomas Hobbes and John Locke, used the Commandments almost exclusively for their civic and moral significance." Paul Grimley Kuntz, *The Ten Commandments on School Room Walls?*, 9 U. FLA. J.L. & PUB. POL'Y 1, 11-13 (1997). Nor was the moral and civic dimension historically understood to apply only to the so-called "second table" of the Decalogue. In his seminal work, *Leviathan*, Thomas Hobbes interpreted the "first table" as laying out an entirely secular "law of sovereignty." *See* THOMAS HOBBES, LEVIATHAN: Part III, ch. 42 (Liberal Arts Press 1958) (1651); *see also* PAUL GRIMLEY KUNTZ, THE TEN COMMANDMENTS IN HISTORY 136-38 (2004).

The importance and intersection of each of these dimensions in our Nation's early culture is reflected in the Ten Commandments' prominent role in the New England Primer, "the most widely read school book in America for 100 years." R.F. BUTTS & L.A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 69 (1953) (noting that some 3,000,000 copies of the Primer were sold between 1700 and 1850).

In 1777, the Primer included the following exchange:

> "Q. 39. What is the duty which God requires of man? A. The duty which God requires of man is obedience to his revealed will. Q. 40. What did God at first reveal to man for the rule of his obedience? A. The rule which God at first revealed to man for his obedience was the moral law. Q. 41. Where is the moral law summarily comprehended? A. The moral law is summarily comprehended in the ten commandments." INTERNET SACRED TEXT ARCHIVE, THE NEW ENGLAND PRIMER, 1777 edition, *at* http://www.sacred-texts.com/chr/nep/1777/ (last visited on Jan. 28, 2005) (from "the shorter catechism").

The Primer then addressed each of the Ten Commandments in turn. *See id.*

Americans at the time of the founding were thus intimately familiar with the Ten Commandments, and would have associated the Decalogue not only with divine law, but also with moral and natural law. When Jefferson's compatriots read "the Laws of Nature and of Nature's God," *see* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), they would likely have thought of the Ten Commandments.

Of course, part of the Framers' genius was in recognizing that, because this "duty which we owe to our Creator . . . is precedent both in order of time and degree of obligation, to the claims of Civil Society," a prohibition on governmental establishment of religion was necessary. *See* James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 1 (1785), reprinted as an Appendix to *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 64 (1947). And a robust protection against religious establishment – to protect the freedom of conscience of every man and woman – is entirely consistent with public acknowledgment of the role the Ten Commandments have played in Western culture and legal development.

Indeed, a statue erected in front of the Ronald Reagan International Trade building in Washington, D.C. depicts a female "liberty of worship" resting upon the Ten Commandments. *See* CARRIE DEVORAH, HUMAN EVENTS ONLINE, EXCLUSIVE PHOTO ESSAY: GOD IN THE TEMPLES OF GOVERNMENT, *at* http://www.humaneventsonline.com/

[24] *See also, e.g., Bertera's Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 200-01 (Pa. 1967); *Comm'rs of Johnston County v. Lacy*, 93 S.E. 482, 487 (N.C. 1917); *Hollywood Motion Picture Equip. Co. v. Furer*, 105 P.2d 299, 301 (Cal. 1940); *Hardin v. State*, 46 S.W. 803, 808 (Tex. Crim. App. 1898); *see also Amicus* Br. of American Center for Law and Justice, *McCreary County v. ACLU*, No. 03-1693, at Appendix A.

article.php?id=2441 (posted Nov. 24, 2003). As a matter of history, that is perhaps not an unfair characterization of the relationship between the Establishment Clause and the Decalogue.[25] The Liberty of Worship statue reflects no purpose offensive to the Establishment Clause; neither does the Ten Commandments monument installed on the Texas Capitol Grounds.

Given their impact on our law and our culture, it is entirely fair to say that the Ten Commandments have helped to shape Texan and American identity. As the Fifth Circuit found, 351 F.3d, at 180-81, placement of the Ten Commandments monument on the Texas Capitol Grounds reflects an intent to acknowledge this historical fact. That is a permissible purpose under the Establishment Clause, constituting a second, independent ground sufficient to satisfy the Court's purpose requirement. *See Lynch*, 465 U.S., at 680, 681 n.6; *see also id.*, at 691 (O'Connor, J., concurring) (observing that the statute struck down in *Stone* "*plainly* had some *secular objectives*, such as . . . *illustrating* [*the Ten Commandments*'] *connection to our legal system*." (emphasis added)).

[25] Petitioner's argument that Texas has a Ten Commandments monument rather than a Hammurabi's Code monument only because the Ten Commandments have a religious message, *see* Pet'r Br., at 25, misjudges cause and effect. Texas has a Ten Commandments monument because the Ten Commandments had a unique impact on American and Texan law and culture. The Ten Commandments undoubtedly had this impact on our society in part because, in addition to their civic and moral use, they had an important religious dimension. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S., at 213.

II. THE "HISTORY AND UBIQUITY" OF THE TEXAS TEN COMMANDMENTS MONUMENT, AND OF TEN COMMANDMENTS MONUMENTS ACROSS THE NATION, ALSO DEMONSTRATE THAT THE TEXAS MONUMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

This Court has consistently upheld the constitutionality of recognizing the impact and significance of religion on American culture and society. For example, the Court has acknowledged that its own proceedings open with the cry, "God save the United States and this Honorable Court." *Marsh v. Chambers*, 463 U.S. 783, 786 (1983). Similarly, in *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, Moses holding the Ten Commandments on the frieze of this Court, and regular presidential proclamations for a National Day of Prayer.[26] 465 U.S., at 673-77. As Justice O'Connor explained, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*, at 693 (O'Connor, J., concurring).

Between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or

[26] The extent to which expressly religious acknowledgments have been deemed acceptable by this Court is well illustrated by the text of President Roosevelt's 1944 Proclamation of Thanksgiving, quoted at length by the Court in *Lynch*: "'[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation . . . . To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nation-wide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.'" 465 U.S., at 675 n.3 (quoting Proclamation No. 2629, 9 Fed.Reg. 13,099 (1944)).

acknowledge the important foundational role religion has played in our Nation's laws and history. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S., at 792. And they are constitutional because, rather than establish religion, such practices are part of "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674.

A. The Monument's History on the Grounds Justifies Its Continued Preservation.

The State's intent to honor the Eagles and to acknowledge the Ten Commandments' impact on our law and culture are legitimate secular purposes justifying the monument's installation between the Texas Capitol and Supreme Court in 1961. The State's desire to preserve an historic monument constituting one part of a protected national landmark serves as an additional, legitimate, and entirely secular purpose for maintaining the Ten Commandments monument on the Texas Capitol Grounds.

Texans have been justifiably proud of their Capitol since its dedication in 1888. *See* J.A., at 119-20. Almost one hundred years later – and twenty-five years after installation of the Ten Commandments monument – the Secretary of the Interior recognized the national significance of the Capitol and its Grounds, designating the entire property a National Historic Landmark in 1986. *See id.*, 103-11. The following year the Texas Legislature created the State Preservation Board and charged it with, among other duties, preserving, maintaining, and restoring the Capitol and its Grounds. *See* TEX. GOV'T CODE §443.007.

The parties stipulated that the "Ten Commandments monument is one element of a legally-protected National Historic Landmark," J.A., at 93, and the State Preservation Board's executive director testified that his agency views the monument as an historic artifact that he is responsible for maintaining, *see id.*, at 70, 73-74. The State's purpose in

maintaining the Ten Commandments monument is thus the same as its purpose in maintaining all of the monuments situated on the Capitol Grounds: historic preservation. This is a legitimate governmental purpose. *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978).

In fact, the State views every commemorative marker installed on the Capitol Grounds as historically significant. During the 1995-1996 restoration of the Grounds' oldest portions, two monuments falling outside the restoration period were removed from their location within those areas – a Bicentennial Fountain contributed by the Texas Association of Realtors in 1975, *see* J.A., at 123, and a Bicentennial Star that had been dedicated by the Austin Lawyers Wives' Club in 1976, *see id.*, at 138. The monuments are now gone, but, in each monument's place, the Board erected a memorial plaque containing a picture and description of the monument, and the reason for its removal. *See id.*, at 77, 123, 138.

Legitimate secular purposes motivated the State's acceptance of each of the seventeen monuments situated on the Texas Capitol Grounds. But no matter what the State's purpose might have been in permitting display of, for example, the Confederate Soldiers monument in 1903, its preservation today is a legitimate state purpose. Similarly, the State has a legitimate purpose in preserving the Ten Commandments monument, which has stood on the Capitol Grounds for more than one-third of the Capitol's one hundred and seventeen years. *See, e.g., Newdow*, 124 S.Ct., at 2323 (O'Connor, J., concurring in the judgment) (noting that fifty years is a considerable span of time in our Nation's history). And the preservation of longstanding historic monuments is entirely consistent with the Establishment Clause.

B. Official Acknowledgment of the Ten Commandments' Historical Impact Has Long Featured Prominently in our Nation's Cultural Landscape.

The civic message communicated by the monument's context, content, and history is reinforced by the ubiquity

of official acknowledgments of the Ten Commandments' historical impact. Acknowledging the Ten Commandments' role in the development of our law has long been a prominent feature of American culture.

Petitioner argues that there is no "long and ubiquitous history" of Ten Commandments monuments on government property. Pet'r Br., at 41 (citation omitted). With respect to Texas, at least, he is wrong. Since 1961, aside from the brief period during which the Capitol Extension was under construction – and for more than one-third of the Capitol's existence – the Ten Commandments monument has stood on the Capitol Grounds twenty-four hours a day, seven days a week. And monuments just like the one in Texas were erected in communities across America in the 1950s. *See Books*, 235 F.3d, at 295. Petitioner asserts that these represent only a "few hundred monuments scattered around the country." Pet'r Br., at 41 (citation omitted). Of course, there are only fifty States, and the fact that fewer than fifty legislatures "scattered around the country" engaged in the opening prayers did not prevent this Court from finding such prayers "ubiquitous" in *Marsh*, 463 U.S., at 788.[27]

In any event, Petitioner defines the relevant practice too narrowly, because official Ten Commandments displays have not been limited to the granite monuments donated by the Eagles. The Ten Commandments have also been officially displayed and depicted on plaques, medallions, sculptures, seals, frescoes, and friezes across our Nation. *See, e.g.*, United States Amicus Br., *McCreary County v. ACLU*, No. 03-1693, at Appendix. Such depictions date back at least to the 1870s. *See, e.g., King v. Richmond County* 331 F.3d 1271, 1273-74 (CA11 2003) (Ten Commandments depicted in superior court seal since at least 1872); *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (CA3 2004) (Ten Commandments plaque donated to county

[27] The United States's amicus brief in *McCreary County v. ACLU*, No. 03-1693, contains an appendix with an informal survey indicating that Ten Commandments monuments can be found in at least twenty States.

in 1918); *Freethought Soc'y of Greater Philadelphia*, 334 F.3d, at 249 (Ten Commandments plaque donated to county in 1920).

Ten Commandments displays abound in the courthouses of our Nation's capitol city. Most famously, of course, the frieze on the south wall of this Court's own courtroom portrays Moses "holding two overlapping tablets, written in Hebrew," on which "Commandments six through ten are partially visible." *See* OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, COURTROOM FRIEZES: NORTH AND SOUTH WALLS, *at* http://www.supremecourtus.gov/about/north&southwalls.pdf (updated Aug. 18, 2000). Elsewhere in this Court's stately building, the Ten Commandments are depicted on the East Pediment, in the Great Hall, and on the support frame of the courtroom's bronze gates. *See* OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, ARCHITECTURAL INFORMATION SHEETS, *at* http://www.supremecourtus.gov/about/archdetails.html (updated Aug. 18, 2000).

Likewise, outside the E. Barrett Prettyman Federal Courthouse down the road stands a twenty-four foot granite trylon bearing a depiction of the Ten Commandments. *See* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, HISTORY OF THE E. BARRETT PRETTYMAN FEDERAL COURTHOUSE, *at* http://www.dcd.uscourts.gov/court-history.html (last visited Jan. 28, 2005); CARRIE DEVORAH, HUMAN EVENTS ONLINE, EXCLUSIVE PHOTO ESSAY: GOD IN THE TEMPLES OF GOVERNMENT: PART II, *at* http://www.humaneventsonline.com/article.php?id=2664 (posted Nov. 24, 2003). And inside that building, a figure of Moses holding the Ten Commandments is mounted on marble cladding behind the bench of the Ceremonial Courtroom. *See* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, HISTORY OF THE E. BARRETT PRETTYMAN FEDERAL COURTHOUSE, *at* http://www.dcd.uscourts.gov/court-history.html (last visited Jan. 28, 2005).

Thus, not only does this Court hear arguments every Term with Moses bearing the Ten Commandments and looking down over the Justices' left shoulders, but the one

time in recent history when the Court was forced to move chambers – during the anthrax scare of 2001 – the Court removed to a courtroom where, again, Moses bearing the Ten Commandments looked down upon it.

These many examples reflect a rich national tradition of depicting and displaying the Ten Commandments on government property. But official acknowledgment of the Ten Commandments' impact on our law and culture has not been limited to physical representations of the Decalogue. The "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," *Lynch*, 465 U.S., at 674, is mirrored by the history of official acknowledgment of the role of the Ten Commandments in American law and culture. Presidents,[28] Congress,[29] and the courts[30] have acknowledged the Ten Commandments' secular impact.

An objective observer might not be familiar with every official reference acknowledging the Ten Commandments's role in our Nation's history. But he should be aware that such acknowledgments have been featured prominently in our Nation's cultural landscape. *See Newdow*, 124 S.Ct., at 2322 (O'Connor, J., concurring in the judgment). Given this

[28] *See, e.g.*, Harry S Truman, Public Messages, in SPEECHES AND STATEMENTS BY THE PRESIDENT, Jan. 1 to Dec. 31, 1950, at 157 (U. S. Government Printing Office 1965) ("The fundamental basis of this nation's laws was given to Moses on the Mount."); John Quincy Adams, LETTERS OF JOHN QUINCY ADAMS TO HIS SON 61, 70-71 (Auburn: James M. Alden, 1850) ("The law given from Sinai was a civil and municipal code as well as a moral and religious code; it contained . . . laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws."); John Adams, 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 9 (Charles Francis Adams ed., 1851) ("If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.").

[29] *See* S. Con. Res. 13, 105th Cong. (1997); H.R. Con. Res. 31, 105th Cong. (1997) ("[T]he Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization.").

[30] *See* page 33, *supra*.

centuries-old chorus of governmental voices acknowledging the Ten Commandments' secular impact on our law and culture, a visitor coming upon the monument situated between the Texas Capitol and Supreme Court would reasonably perceive the State to be sending a similar message – a message acknowledging the civic impact the Ten Commandments have had on our Nation and on the State of Texas.

The Ten Commandments monument on the Texas Capitol Grounds thus serves secular purposes and would not reasonably be perceived as an endorsement of religion or of any particular religious belief. It therefore satisfies the test this Court laid out in *Allegheny*, 492 U.S., at 592-94.[31]

III. THE TEXAS TEN COMMANDMENTS MONUMENT SURVIVES ANY OTHER TEST APPLIED TO ASSESS ITS CONFORMITY WITH THE ESTABLISHMENT CLAUSE.

A. The Monument Does Not Discriminate.

Petitioner argues that, under the rule of *Larson v. Valente*, 456 U.S. 228 (1982), Texas should be required to

[31] In her concurrence in *Newdow*, Justice O'Connor evaluated four factors to determine whether the phrase "under God" in the Pledge of Allegiance constituted an instance of "ceremonial deism." *See* 124 S.Ct., at 2323-26. These factors were: 1) history and ubiquity; 2) absence of worship or prayer; 3) absence of reference to a particular religion; and 4) minimal religious content. *See id.* The monument fares well under these factors, as: 1) official references to the Ten Commandments are ubiquitous, and have been throughout our history; 2) the monument involves no worship or prayer; 3) the monument bears a deliberately nonsectarian version of the Ten Commandments; and 4) the Ten Commandments, while religious in origin, have had an undeniable and unique civic impact. While the monument satisfies these factors, they were designed to evaluate claims of "ceremonial deism." For monuments acknowledging the historical and cultural contributions of religious faiths, the endorsement test remains the proper rubric. Indeed, the last two *Newdow* factors, in particular, do not fit well in an analysis of governmental acknowledgments of religion because, by definition, such acknowledgments will reference religion and have some religious content.

meet strict scrutiny to justify its display of the Ten Commandments monument. *See* Pet'r Br., at 19. This Court has already considered and rejected the argument that *Larson*'s strict scrutiny should be applied to governmental displays containing religious elements.[32] In *Lynch*, the court of appeals read *Larson* to require strict scrutiny of Pawtucket's display of a crèche, which, according to the lower court, discriminated between Christian and other religions. *See Lynch*, 465 U.S., at 687 n.13. This Court disagreed with that application of its precedent: "It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*." *Id.* If displaying a "specifically Christian" crèche, *see Allegheny*, 492 U.S., at 603, is not discriminatory in the sense contemplated in *Larson*, then displaying the Ten Commandments, which are identified with more than one faith tradition, cannot be discriminatory in that sense. *Larson* contemplated, in contrast, "substantial evidence of overt discrimination against a particular church." *Id.*, at 679. That is in no way present with the Texas monument.[33]

[32] The Court also declined to apply *Larson*'s strict scrutiny test in *Allegheny*, which involved displays of both distinctively Christian and distinctively Jewish symbols (a crèche and menorah, respectively), and *Pinette*, which involved another distinctively Christian display (a cross).

[33] Petitioner's argument that the monument's version of the Ten Commandments reflects an impermissible preference for Protestants over Jews and Catholics, *see* Pet'r Br., at 13, fails for two reasons. First, the claim that the monument bears a particular Protestant version is wrong as a factual matter. The version of the Ten Commandments inscribed on the monument is deliberately nonsectarian, created by Jewish, Catholic, and Protestant representatives. *See Freedom from Religion Found., Inc.*, 898 P.2d, at 1017. And second, variances in religious approaches to a text are not relevant when a government displays that text for civic reasons and with a civic message. The myriad governmental acknowledgments of the Ten Commandments' role in our Nation's history have never been intended or understood as specific doctrinal pronouncements. *See, e.g., Books*, 121 S.Ct., at 2212

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B. The Monument Does Not Coerce.

In the display cases most analogous to this one, the Court has asked the purpose and effect questions addressed above. *See Lynch*, 465 U.S., at 679-82, and *Allegheny*, 492 U.S., at 592. The Court has also had occasion to ask, in the context of governmental speech, whether the challenged activity "coerce[s] anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 586 (1992). The Texas monument survives this test as well.

The Ten Commandments monument sitting passively behind the Texas Capitol does not coerce anyone to do anything. Petitioner has made no allegation or argument to the contrary. By definition, this forty-year-old inert granite slab passes any coercion test the Court might choose to apply. *See, e.g., Allegheny*, 492 U.S., at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[W]here the government's act of recognition or accommodation is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment.").

C. The Texas Monument Is Not Unconstitutional Under *Stone v. Graham*.

Petitioner places great reliance on this Court's *per curiam* decision in *Stone*, 449 U.S., at 41, regarding the State of Kentucky's purpose for posting the Ten Commandments on schoolroom walls. That decision is inapposite here, because Texas has its own, distinct secular purposes for permitting the installation of the Ten Commandments monument on its Capitol Grounds. Moreover, in *Stone*, the Court was exercising particular vigilance due to the case's public school setting. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Wallace*, 472 U.S., at 81 (O'Connor, J., concurring in judgment). The special

(Rehnquist, C.J., dissenting from denial of certiorari) (monument reflects Ten Commandments' role in development of our legal system).

concerns posed by government speech in the school setting are not relevant here, and the Court's customary deference to a State legislature's articulated purposes is appropriate.

As the Court observed in *Stone*, *even under the heightened protections of the school setting*, if "the Ten Commandments are integrated into the school curriculum, . . . the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S., at 42. Here, the Texas monument meets even that heightened test, because it is a historical monument displayed in context, surrounded by other monuments to persons, events, and ideals that have contributed to the culture and diversity of Texas.

IV. THE MONUMENT PRESENTS A FAR LESSER THREAT OF ESTABLISHMENT THAN DISPLAYS AND PRACTICES CONDONED BY THIS COURT.

A majority of this Court last spoke with one voice in determining whether a governmental display violates the Establishment Clause in *Lynch*. And in that case, the Court applied an *a fortiori* analysis:

> "[T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, . . . expenditure of public funds for transportation of students to church-sponsored schools, . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, . . . noncategorical grants to church-sponsored colleges and universities, . . . and [] tax exemptions for church properties. . . . It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws . . . the release time program for religious training . . . and the legislative prayers upheld in *Marsh*. . . . We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause." *Lynch*, 465 U.S., at 681-82 (citations and footnotes omitted).

Using the same analysis, the Texas Ten Commandments monument cannot be viewed as providing a greater benefit to or endorsement of religion than these practices and programs upheld against Establishment Clause challenges. For example, in *Lynch*, the Court determined that the distinctively Christian crèche displayed by the City of Pawtucket was "no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id.*, at 683. Therefore, the Court upheld government display of the crèche.

Likewise, in *Allegheny*, the Court upheld a government display of a Chanukah menorah – a distinctively Jewish religious symbol commemorating "the miracle of the oil as described in the Talmud" – that was placed just outside the City-County building in downtown Pittsburgh, "next to a Christmas tree and a sign saluting liberty." *Allegheny*, 492 U.S., at 578, 614 (opinion of Blackmun, J.). This menorah – at eighteen feet almost three times as tall as the Ten Commandments monument challenged here – was "lit during a religious ceremony complete with traditional religious blessings." *Id.*, at 642 (Brennan, J., concurring in part and dissenting in part). The Court nevertheless found that, in context, it neither endorsed nor impermissibly advanced religion. *See id.*, at 679 (Kennedy, J., concurring in the judgment in part and dissenting in part); *id.*, at 635-36 (O'Connor, J., concurring

in part and concurring in the judgment); *id.*, at 620 (opinion of Blackmun, J.).[34]

And in *Marsh*, the Court upheld the Nebraska Legislature's "practice of opening sessions with prayers by a state-employed [Presbyterian] clergyman" who opened the Legislature's sessions with prayers offered "in the Judeo-Christian tradition." 463 U.S., at 786, 793. This Court reasoned that, due to its long history in the American political landscape, such legislative prayer had "become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792.[35]

[34] The Court's rejection of the crèche displayed in *Allegheny* does not suggest a different result. That large crèche sat alone on the Grand Staircase, the main and most beautiful part of the Allegheny County Courthouse. It was highlighted by a floral frame, contained the exclusively religious admonition "Glory to God in the Highest," and was accompanied by a sign indicating its ownership by a religious organization. *Id.*, at 598-600. The display challenged here, by contrast, is one of the smallest of seventeen monuments on the Capitol Grounds, *see* J.A., at 87, and sits in a relatively inconspicuous position, situated hundreds of feet from the two least-used entrances to the Capitol, *see id.*, at 37, 87.

[35] The comparison with *Marsh* is particularly appropriate here, where a visitor to the Texas Capitol, before wandering past the Ten Commandments monument outside, might well observe the House open its daily session with a prayer from its own chaplain. *See* Tex. H.R. Rule 6 §1(3), Tex. H.R. 5, 78th Leg., R.S. (2003). And a visitor who proceeded past the monument to the Texas Supreme Court would discover that it, too, opens its proceedings with an unmistakably religious petition: "God save the State of Texas, and this Honorable Court." This is, of course, the state analogue of the invocation opening sessions of each of the Federal Courts, including this Court. *See Marsh*, 463 U.S., at 786. No visitor could reasonably believe that the passive Ten Commandments monument sitting along one of the sidewalks between the State Capitol and Supreme Court represented a greater threat of religious establishment than the active supplications to God offered within the Capitol's

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The crèche upheld in *Lynch* centered around a physical representation of the Baby Jesus – a symbol with overwhelmingly religious connotations. The menorah upheld in *Allegheny* was over eighteen feet high. And the prayers upheld in *Marsh* involved the active and affirmative invocation of the deity on behalf of government officials. The passive Texas monument, at one-third the size of the menorah, displayed in a museum setting and laden with historic and secular meanings far beyond its religious connotations, *a fortiori* comports with demands of the Establishment Clause.

◆

The Framers considered and rejected a rule that would have prohibited any governmental activity "touching religion." *See* 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789); *see also Lee*, 505 U.S., at 612-13 (Souter, J., concurring). Forcing the State Preservation Board to remove only one of the seventeen monuments on the Capitol Grounds, because that monument contains a text with religious significance, would be an act of discrimination and hostility. "[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S., at 673.

Our Nation was born of many faiths, and we as a people may celebrate our full diversity. A Native-American totem pole erected in a Seattle park, *see* SEATTLE PARKS AND RECREATION, CITY OF SEATTLE, PIONEER SQUARE, *at* http://www.cityofseattle.net/parks/parkspaces/Pioneer%20Square.htm (updated Aug. 3, 2004); a legislative designation of "Buddha Day" in Hawaii, *see* Haw. Rev. Statutes §8-4; a symbol of Aztec mythology in the Rotunda of the Texas Capitol, *see* J.A., at 164-65; a Ten Commandments monument on the Texas Capitol Grounds – none of these offends the Establishment Clause. Each acknowledges and

stately chamber and the Supreme Court's imposing courtroom, both a stone's throw away. *See* J.A., at 91, 211.

celebrates the diverse influences of our religious heritage. And each is consistent with the Constitution.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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January 2005

ATTACHMENTS

Attachment A

Aerial photograph of the northwest quadrant of the Capitol Grounds from the State Preservation Board website at http://www.tspb.state.tx.us/ spbgallery/CurrPhoto/3.htm; *see also* J.A., at 94 (joint stipulation of the parties that "the State Preservation Board maintains a website which includes a photograph of the Ten Commandments monument").

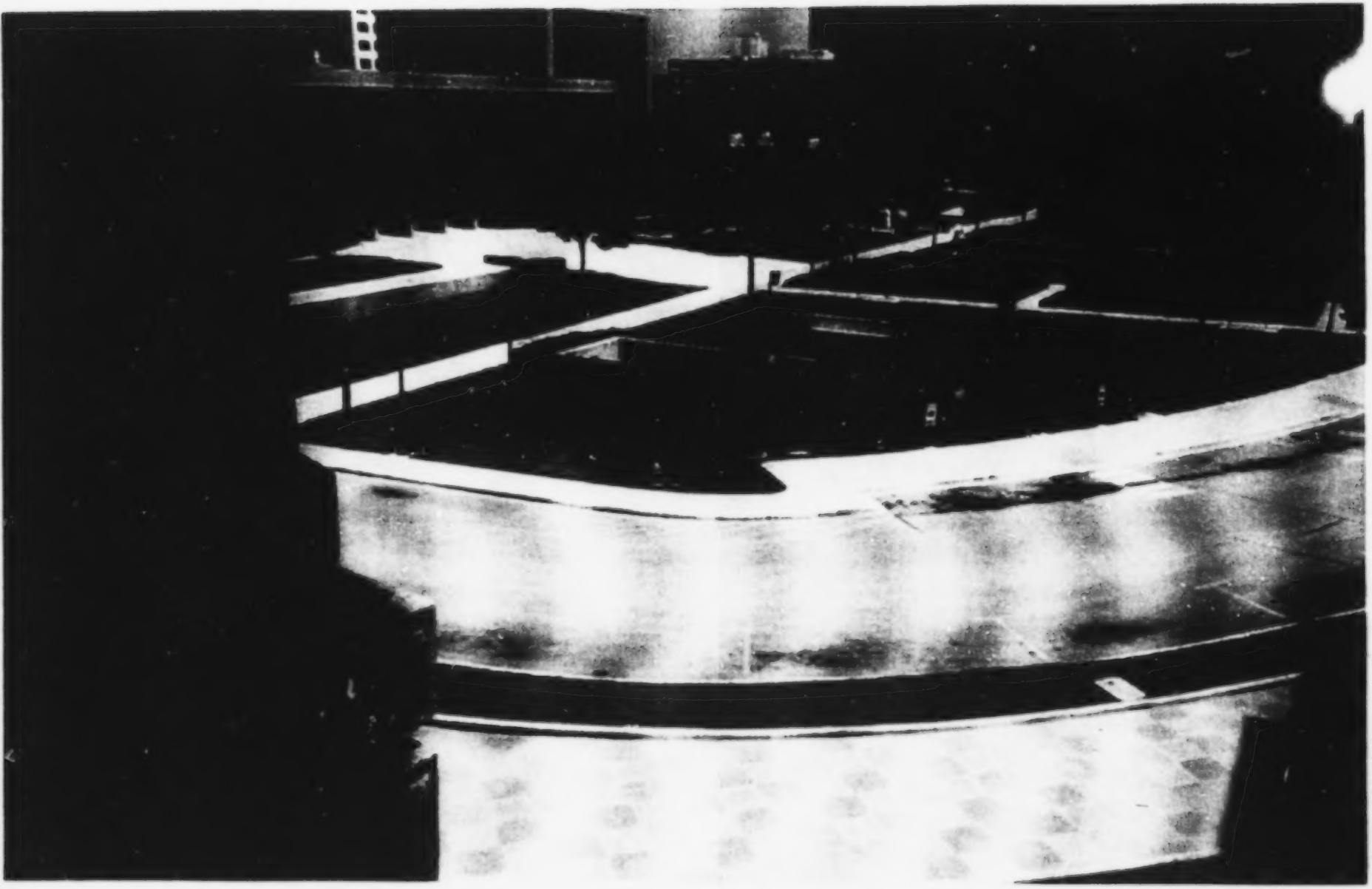
Starting from the American flag at the bottom of the photograph, to the right is a light post and then the World War I monument (in the shade of a tree). Continuing up along the straight sidewalk, past the first intersection going off to the right, stands the Boy Scouts Statue of Liberty monument on the right. Directly across the sidewalk is the Pearl Harbor Veterans monument (in the shade of a tree). All the way at the end of the sidewalk, next to the driveway with parked cars, is the Ten Commandments monument.

Curving along the driveway to the left, one comes to the Tribute to Texas Children (on the grass, to the right of the red truck), which stands 111 feet from the Ten Commandments monument. *See* J.A., at 95. And, to the right of the children, facing the Tyler rose garden, stands the tribute to the Texas Pioneer Woman (120 feet from the Ten Commandments Monument). *Id.*

Attachment B

Trial Exhibit 61: Photograph of the northwest quadrant of the Capitol Grounds, taken from the perspective of the Capitol. The left-most monument is the Ten Commandments monument, next to the light post. Moving along the straight sidewalk beside the monument, past the wide walkway to the Supreme Court and near the top of the photograph, one finds the boy Scouts of America Statue of Liberty monument on the left and, directly across the sidewalk, the Pearl Harbor Veterans monument. A little further up the sidewalk, on the right, is the World War I Veterans monument (partially obscured from the Capitol vantage point by a tree). Further up to the left, and also obscured by a tree, is the Korean Veterans monument, the largest monument in this area. *See* J.A., at 131 (which also shows the World War I monument, the Pearl Harbor monument, and the Boy Scouts monument).

The right-most monument in the photograph (in the same green triangular lawn as the Ten Commandments) is the Tribute to Texas Children (surrounded, in this photograph, by white string). It stands 111 feet from the Ten Commandments monument. To the left of the Texas Children monument is the Texas Pioneer Woman monument (facing the sidewalk and the Tyler rose garden), 120 feet from the Ten Commandments monument. *Id.*, at 95.



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No. 03-1500

Supreme Court, U.S.
FILED
FEB 22 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION

On the grounds of the Texas State Capitol there is one prominent religious symbol: a large Ten Commandments monument between the Capitol and the Supreme Court. The hundreds of pages of briefs filed by Respondent and its amici cannot obscure the fact that the Ten Commandments are a preeminent symbol of some, but not other, religions and that they express a profoundly religious message: there is a God and that God has commanded rules for behavior.

The position taken by Respondent and its amici in defending this monument has no stopping point. Under its approach, the State of Texas could put any religious symbol anywhere on the Capitol's grounds. The United States' brief, for example, emphasizes that the Ten Commandments monument is permissible because it is a private donation, because there are other statues on the Capitol's grounds, and because religion has been part of the foundation of American law and society. Brief for the United States ["U.S. Brief"] at 5. By this view, the State of Texas could put a statue of Christ anywhere on its statehouse grounds, even atop the Capitol dome, so long as it was donated by someone else, was one of several monuments in the Capitol complex, and was said to convey the importance of Christianity as part of the history of Texas.

As with any Establishment Clause challenge to a religious symbol on government property, the factual context matters greatly. Unfortunately, the State's presentation of the facts is at best disingenuous and is clearly inconsistent with the record in a number of key ways:

• The Ten Commandments monument is the only evident religious symbol on the State Capitol's grounds. The State repeatedly says that there are other religious symbols on the grounds of the Texas State Capitol. *See, e.g.,* Respondent's Brief ["Resp. Br."] at 2, 5, 13. However, unlike the Ten Commandments monument, no reasonable

observer would perceive these other symbols to be religious. For example, the State says that on a monument honoring children in Texas, one of several children has a small cross around her neck. Resp. Br. at 13. As the photograph in the record shows, this cross is too small to be noticeable to most observers. (Exhibit 20, J.A. at 136).

The State also points to the Aztec symbol on the Six Flags Over Texas display on the floor of the Capitol Rotunda. Resp. Br. at 1, 2 n.3, 13. One of the six flags is the Mexican flag and the State says that a symbol on this flag – a brown eagle, eating a serpent while perched on a prickly pear – is religious. (Exhibit 40, J.A. at 163). At most, the observer would recognize the Mexican flag and it is doubtful that many people would know that the eagle eating a serpent is a religious symbol. The official description of the Six Flags display, which is in the record, does not even mention that there is a religious symbol within it. (Exhibit 40, J.A. at 165). In fact, the State's witness at trial described this as part of Aztec mythology about the location of the capitol, not as religious. J.A. at 67.

The only other religious symbols the State points to are a World War I monument which says "God – Country – Peace" (Exhibit 16, J.A. at 132) and two untranslated Latin phrases that appear on a Confederate Flag high atop a building and behind the bench in the old Supreme Court chambers. Resp. Br. at 2, 13. None of these is anything like the Ten Commandments monument which is the only sacred text on the Capitol's grounds and the only religious message.

• No other monument, and certainly no religious symbol, is visible when one stands before the Texas Ten Commandments monument. Although there are other displays in the area north of the Texas Capitol, they are obscured by hedges when one stands in front of the Texas monument.[1]

[1] Texas misleadingly describes the Ten Commandments as being "surrounded by six other monuments." Resp. Br. at 8, 18. As the

(Continued on following page)

The photographs in the record show that the Ten Commandments monument stands by itself. (Exhibits 48, 53, 57, J.A. at 210-212). Texas attempts to refute this by including aerial pictures of the Capitol as attachments to its brief. (Attachments A and B to Resp. Br.). Of course, from the air, all of the Capitol's grounds and monuments are visible. But the perspective of the reasonable observer certainly cannot be what is seen from a helicopter or low-flying airplane. From the perspective of a passerby, the Ten Commandments monument is just like the impermissible creche in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 598 n.48 (1989): a free-standing religious symbol with no others immediately visible, but with other symbols in a larger area.

• The Ten Commandments monument is large and sits in a uniquely prominent place. Texas attempts to minimize the monument as insignificant, saying that it is the "back door of the Capitol" and that it is one of the smallest monuments. Resp. Br. at 13, 15. To the contrary, as the State argues later in its brief, Resp. Br. at 20-21, the monument is in a particularly important location, "on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building." *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003). The monument is large and conspicuous, standing six feet high and three and a half feet wide. *See* Appendix C to Petition for Writ of Certiorari, at 21; Exhibit 21, J.A. at 137. No one walking outside from the State Capitol to the Texas Supreme Court could possibly miss it at the intersection of the two sidewalks that run in front of these buildings.

photographs in the record demonstrate, this is false. J.A. at 210-212. The few other monuments north of the Capitol are hundreds of feet away (Stipulation 31, J.A. at 95) and are obscured by hedges.

The simple reality is that the Texas legislature put the Ten Commandments monument between the State Capitol and the State Supreme Court to convey a religious message and that is what it does. A central argument by the State and its amici is that the Ten Commandments are there to convey the role of religion as a foundation for American law. Resp. Br. at 20. However, the monument standing by itself in this location conveys the message that the Ten Commandments are *the* source of American law. The government can place the Ten Commandments on government property as part of an overall display about the sources of law.[2] But that is not what Texas has done and its large Ten Commandments monument thus violates the Establishment Clause.

ARGUMENT

I. THE TEN COMMANDMENTS MONUMENT EXPRESSES A RELIGIOUS MESSAGE AND IS A RELIGIOUS SYMBOL.

A. The Ten Commandments Are Religious In Their Origin And Their Content.

The State and its many amici care deeply about the Ten Commandments monument remaining on the State Capitol's grounds precisely because the Ten Commandments are such an important symbol to some religions. As this Court explained in *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam): "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose

[2] As explained below, this is why the vast majority of Ten Commandments displays cited in the United States' brief and various amicus briefs are acceptable under the First Amendment: they are accompanied by other symbols, both secular and religious, and are part of unified exhibits about sources of law that express a clearly secular message.

can blind us to that fact." The religious content of the Texas Ten Commandments monument is heightened by the presence of a symbol of Christ and two Stars of David.

The State attempts to distinguish *Stone v. Graham* because it involved schools. Resp. Br. at 45-46. Although, of course, this is true, that does not affect the central point of *Stone v. Graham*: the Ten Commandments are a religious text and many of the Commandments "concern[] the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day." 449 U.S. at 42.[3]

The State and its amici attempt to deemphasize the religious content of the monument by arguing that the Ten Commandments monument is there for a secular purpose: to convey the importance of the Decalogue as an influence on law and culture. *See, e.g.*, Resp. Br. at 31-32; U.S. Br. at 10-12, 15-19. There are several problems with this argument. First, the presentation of the Ten Commandments on the Texas monument emphasizes its religious content and gives no indication of its secular role. On the monument, the words "I am the Lord Thy God" are at the very top and prominently displayed in letters larger than the rest of the monument (*see* Appendix C to Petition for Writ of Certiorari, at 21; Exhibit 21, J.A. at 137), rather than

[3] It is suggested that *Stone v. Graham* is a "weak precedent" because it was "a cavalier summary reversal." Brief of Amicus Curiae, Thomas More Law Center, at 5. To the contrary, as Justice White explained, the summary reversal in *Stone v. Graham* reflected the Court's recognition that displaying the Ten Commandments in classrooms was a clear and obvious violation of the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263, 284-85 (1981) (White, J., dissenting) ("Just last Term, the Court found it sufficiently obvious that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down.") This Court repeatedly has cited approvingly to *Stone v. Graham*. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984).

being in the same size type and a part of the First Commandment as they are for many religions. *See, e.g.,* Solomon Goldman, *The Ten Commandments* 19-20, 28-29 (1956). There is absolutely nothing on or near the monument that would indicate to the reasonable observer that it is there because of the role of the Ten Commandments as part of the development of secular law.

Second, the presence of the Ten Commandments monument as the *only* monument remotely concerning the sources of law conveys the message that it is *the* foundation of American law. There is a dispute over whether the Ten Commandments played a significant role in the development of American law because they were rarely mentioned early in American history and they are substantially about religious behavior.[4] No one – not the State of Texas or any of its amici – contends that the Ten Commandments are the only source, or even the preeminent source, of American law. But that is exactly the message that is conveyed by it being alone on a "direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building." *Van Orden v. Perry*, 351 F.3d at 181.

This is exactly why the vast majority of the Ten Commandments symbols around the country cited by the State and its amici are distinguishable from the monument at issue in this case: they are part of overall displays in which the Ten Commandments is one of many symbols about the sources of law. For example, the two displays

[4] *Compare* Brief of Amicus Curiae, Anti-Defamation League and Philip A. Cunningham, at 7-20, *with* Brief of Amicus Curiae American Center for Law and Justice, at 3-26. However, this dispute over the importance of the Ten Commandments in American law just highlights that Texas has acted for the purpose of advancing a religious view that the Ten Commandments are a foundation of secular law and its monument conveys the message that the Ten Commandments are *the* basis for American law.

mentioned in the State's brief illustrate this distinction. Resp. Br. at 41. The frieze above the bench in the Supreme Court has images of Moses, Confucius, Mohammed and secular figures including Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall, and thus clearly is about lawgivers through history. *See County of Allegheny*, 492 U.S. at 653 n.13 (Stevens, J., concurring in part and dissenting in part) (describing the religious symbols as part of an overall display). Similarly, the display in the E. Barrett Prettyman Federal Courthouse mentioned in many of the briefs (*see, e.g.,* Resp. Br. at 41; U.S. Br. at 1a), also has tributes to Blackstone, Hammurabi, and other sources of law. See http://www.dcd.uscourts.gov/court-history.html. In fact, this is true of virtually all the displays listed in the Appendix to the United States' brief.

Such displays, which contain multiple secular and religious symbols about the sources of law, do not violate the Establishment Clause.[5] Contrary to the assertion in the United States' brief, Petitioner does not contend that "the Commandments can never be displayed in any manner." U.S. Br. at 29. Rather, Petitioner's position is that the Ten Commandments are a religious symbol and can be displayed on government property only if it is clear that they are present for reasons other than expressing a religious message.[6] Although that is true for a great many of the Ten Commandments displays mentioned in the

[5] Different issues are presented if the secular displays are not added until after the Establishment Clause challenge has been filed. *See Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000).

[6] The Amicus Brief of the Baptist Joint Committee, at 3-10, sensibly explains that the government's display of sacred text should be understood as endorsing that text, unless the government visibly and objectively negates that endorsement. But nothing on the Texas Ten Commandments monument in any way negates the government's endorsement for the message contained on it.

State and amici briefs, it is not so for the Texas monument which stands by itself.

B. Differing Religions Have Varying Versions Of The Ten Commandments And The Choice Of A Version Prefers Some Religions Over Others.

There is no single version of the Ten Commandments. Religions that regard the Ten Commandments as sacred have different versions and these differences are enormously important in the theology and belief systems of religions.

Respondents argue that the Texas Ten Commandments monument is "nonsectarian" because the Fraternal Order of Eagles consulted with "Jewish, Catholic, and Protestant representatives" in devising the text. Resp. Br. at 44 n.33. First, there is no such thing as a "nonsectarian" version of the Ten Commandments because many religions, and those who do not believe in religion, completely reject the Ten Commandments as a religious symbol and reject its message that there is a single God who has issued commandments for behavior. *See, e.g.,* Brief for the Hindu American Foundation and Others Representing the Interests of Hindus, Buddhists, and Jains, at 2 (characterization of the Ten Commandments monument as nonsectarian "ignored the effect of the Ten Commandments monument on non-Judeo-Christians, whose beliefs regarding the nature of God and the relationship between man and God different greatly from those enshrined in the monument and for whom the Monument is clearly and unavoidably 'sectarian.'") As Justice Blackmun observed, "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." *County of Allegheny*, 492 U.S. at 615 (Blackmun, J., concurring).

Second, the fact that the Fraternal Order of Eagles consulted with "representatives" of different faiths does not make the content of the monument non-sectarian. To the contrary, the Texas monument is almost identical to the Protestant, King James Bible version. *See* Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere,* Fordham L. Rev. (forthcoming 2005) (the Fraternal Order of Eagles monuments have "a translation that comes from the Protestant King James Bible.") This is evident in countless ways. The Jewish version of the Ten Commandments, for example, has the First Commandment proclaiming, "I the Lord am Your God who brought you out of the land of Egypt, from the house of slavery." *See* Jewish Publication Society of America, *The Torah: The Five Books of Moses* 134 (1962); Solomon Goldman, *The Ten Commandments* 19-20, 28-29 (1956). The Texas Ten Commandments monument adopts the Christian and not the Jewish version of the Decalogue by elevating the "I am the Lord Thy God" language apart from the Commandments and by completely omitting the text about God bringing the Jews out of Egypt. *See* Brief Amici Curiae of the American Jewish Congress, et al., at 19. This deletes a core part of the Jewish faith's emphasis on the covenant between God and the Jewish people tracing to God leading the Jews from bondage in Egypt. *See id.* at 20.

The monument adopts the Protestant version of the Second Commandment which prohibits "graven images" and rejects the Catholic version of the Second Commandment which usually omits this. United States Catholic Conference, Inc., *Catechism of the Catholic Faith* 561 (1991). This distinction reflects central differences in worship and theology between these faiths. *See* John C. Holbert, *The Ten Commandments* 10 (2002).

The Texas monument adopts the King James Bible version saying, "Thou shalt not kill," and rejects the Jewish version which says, "You shalt not murder." Jewish theologians, and others, place great significance on this

difference as to important issues such as capital punishment and whether killing in war is justified. *See* W. Gunther Plaut, ed., *The Torah: A Modern Commentary* 557 (1981).

There are many other ways that the Texas monument adopts the Protestant version of the Ten Commandments and rejects the versions of other faiths. *See, e.g.,* Brief Amici Curiae of the American Jewish Congress, et al., at 18-23. Contrary to the assertion of the United States, these are not simply variations in "translation." U.S. Br. at 28-29. These are differences which go to fundamental aspects of religious faith and practices. No matter who the Fraternal Order of Eagles consulted, the version of the Ten Commandments between the Texas Capitol and the Texas Supreme Court is sectarian in its origin and message.

II. THE GOVERNMENT'S PLACEMENT OF A LARGE TEN COMMANDMENTS MONUMENT BETWEEN THE TEXAS STATE CAPITOL AND THE TEXAS SUPREME COURT VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT FAVORS SOME RELIGIONS OVER OTHERS, BECAUSE THERE IS NO SECULAR PURPOSE, AND BECAUSE THE EFFECT IS IMPERMISSIBLY TO ENDORSE RELIGION.

A. The Ten Commandments Monument Violates The Establishment Clause Because It Favors Some Religions Over Others.

This Court has explained that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). This Court has stated that "[t]he First Amendment mandates governmental neutrality between religion and religion. . . . [T]he State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute."

Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968). At the very least, any government preference for some denominations over others must meet "strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. at 246.

The Texas Ten Commandments monument is a "denominational preference": it is a religious symbol and conveys a religious message adopted by some religions and not others, and indeed expresses one faith's version of the Ten Commandments at the seat of the Texas state government. Contrary to what the United States asserts, this does not mean that the Ten Commandments never can be displayed or that "universal sectarian agreement" is needed for religious symbols to be on government property. U.S. Br. at 29. Tablets, in the shape some religions believe that Moses received, *without text* – such as appear above the Supreme Court's bench – obviously are different from the Texas monument which has the text of one denomination. Moreover, the government can place the Ten Commandments, with its text, along with symbols of other religions in an overall display with a clearly secular purpose, such as a commemoration of religious diversity. But the choice of Texas to place just the Protestant version of the Ten Commandments between the Texas Capitol and the Texas Supreme Court is exactly the favoritism among religions that the Establishment Clause forbids.

The State contends that this Court in *Lynch v. Donnelly* held that the prohibition of government discrimination among religions does not apply to displays of religious symbols. Resp. Br. at 44. That is not at all what *Lynch* said. In *Lynch*, this Court upheld the presence of a nativity scene on government property because it was accompanied by many other symbols that made clear that it was part of the celebration of the December holiday season. The Court stated that there was no discrimination among religions because the overall message was clearly secular: "It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are

unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson*." 465 U.S. at 687 n.13. Although the Court upheld the holiday display in *Lynch*, it accepted that the government may not discriminate among religions in placing religious symbols on government property.

B. The Ten Commandments Monument Violates The Establishment Clause Because There Is No Legitimate Secular Purpose For The State's Installing It On Government Property Between The Texas State Capitol And The Texas Supreme Court.

This Court has stressed that the government violates the Establishment Clause if its "actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), *quoting Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). The State says that it need show "only a single legitimate secular purpose for the display to satisfy [the secular purpose] requirement." Resp. Br. at 26. But this is incorrect under the law of the Establishment Clause. As Justice O'Connor explained, the requirement for a secular purpose is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. at 691 (O'Connor, J., concurring). The government violates the Establishment Clause if its primary purpose is to advance religion, even if some secular purpose can be invoked for its action. *See Edwards v. Aguillard*, 482 U.S. at 594; *Stone v. Graham*, 449 U.S. at 41.

In addition to its claim that the Ten Commandments monument is secular because of its supposed role as a foundation of American law, discussed above, the State identifies two other possible secular purposes. First, the State argues that the purpose of the monument is to honor the Fraternal Order of Eagles. Resp. Br. at 27-29. But this argument, too, has no stopping point: under the State's

view, the government could place any religious symbol anywhere on its property so long as it came as a gift. It is for this reason that in *County of Allegheny* the nativity scene in the county courthouse was declared unconstitutional even though there was a similar dedication indicating that it was donated by a private group. 492 U.S. at 600. Likewise, in *Stone v. Graham*, it did not matter that the Ten Commandments posted in public school classrooms were financed by private donations. 449 U.S. at 42. The government cannot evade the Establishment Clause when it erects a religious monument simply by proclaiming that it was donated by others and was placed to honor the donors.

Nor is it credible that Texas chose to place the Ten Commandments between its Capitol and its Supreme Court to honor the Fraternal Order of Eagles. Neither a person viewing the monument or reading the State's brief could discern what role the Fraternal Order of Eagles played in Texas or nationally that would cause Texas to honor this organization. Resp. Br. at 27-29. Also, the monument itself has not been designated an historic landmark; it is the entire Capitol grounds which have received this status. J.A. at 103-11. Even if the State wished to acknowledge the Fraternal Order of Eagles at the time it accepted this gift, this cannot change the fact that the only plausible purpose for displaying the monument in its uniquely prominent place is because of its religious content.

Second, the State offers a new purpose for keeping the Ten Commandments monument: it has become a historic landmark. Resp. Br. at 38-39. There is absolutely no indication in the record that this is the State's "actual purpose" for keeping the Ten Commandments monument. *See Edwards v. Aguillard*, 482 U.S. at 585 (stressing that the focus is on the government's "actual purpose.") There is nothing on or near the monument to inform the reasonable observer that it is there as a historic landmark, rather than as an obvious religious symbol and message.

Nor can an otherwise impermissible religious symbol on government property be saved just by the government labeling the object a historic landmark.

Moreover, the passage of time cannot justify a government action that violates the Constitution; there is no statute of limitations for Establishment Clause claims. In *School Dist. of Abbington Township v. Schempp*, 374 U.S. 203 (1963), this Court invalidated a 50-year-old statute requiring the recitation of Bible passages in public schools. *See id.* at 240-41 (Brennan, J., concurring) (explaining why the longevity of a practice does not immunize it from Establishment Clause challenges).

The State of Kentucky in *Stone v. Graham*, like Texas in this case, chose to display the Ten Commandments because some religions regard them as singularly important, but invented secular rationales to justify its action. As the Court explained in *Stone v. Graham*, "no legislative recitation of a supposed secular purpose can blind us to th[e] fact" that purpose of displaying the Ten Commandments on government property is to express a religious message and that such a purpose violates the Establishment Clause. 449 U.S. at 41.

C. The Large Ten Commandments Monument Between The Texas State Capitol And The Texas Supreme Court Violates The Establishment Clause Because It Is An Impermissible Government Endorsement of Religion.

Texas concedes that the Ten Commandments monument violates the Establishment Clause if the reasonable observer would perceive it as impermissibly endorsing religion. Resp. Br. at 11. Three factors make it likely that the "reasonable observer" would see the Texas Ten Commandments monument as impermissibly endorsing religion: its placement, its context, and its content.

1. The placement of the Ten Commandments monument.

This Court has stressed that the presence of a religious symbol at the seat of government conveys a particularly powerful message of government endorsement of religion. In *County of Allegheny*, this Court emphasized that the nativity scene in the county courthouse was unconstitutional because of its display in a central location. As Justice O'Connor noted, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government. . . . [B]y permitting the display of the creche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *County of Allegheny*, 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment).

The State tries simultaneously to argue that the Ten Commandments monument is in an inconspicuous place, Resp. Br. at 14, and that it is at a very important spot to convey the significance of the Decalogue as part of civil culture. Resp. Br. at 20. Apart from the tension between these two arguments, the State's position ignores that the *only* monument at the sidewalks in front of the State Capitol and State Supreme Court is the Ten Commandments and that this conveys the "unmistakable message" that the government "supports and promotes" the religious message on the monument. *County of Allegheny*, 492 U.S. at 599-600 (O'Connor, J., concurring in part and concurring in the judgment).

2. The context of the Ten Commandments monument.

Standing in front of the Ten Commandments monument one sees no other monuments. The photographs in the record show that the other monuments in the area

north of the Capitol are a distance away and are obscured by hedges. *See* Exhibits 48, 53, 57, J.A. at 210-212. The State nevertheless argues that the entire Capitol grounds, with all of the other monuments and displays, inside and outside, is a "museum." *See, e.g.,* Resp. Br. at 16.

First, the appropriate perspective is from the reasonable observer who walks by the Ten Commandments monument. In *County of Allegheny*, this Court declared the creche in the county courthouse unconstitutional, even though there were other symbols throughout the building. The Court explained that the "creche, with its floral flame, was its own display distinct from any other decorations or exhibitions in the building." 492 U.S. at 598 n.48. The same is true of the Texas Ten Commandments monument: it is its own display, distinct from any other decorations or exhibitions on the grounds of the Capitol. There is no reason to believe that a person seeing the Ten Commandments monument, or the creche in *County of Allegheny*, would associate it with any of the other symbols elsewhere on the government's property.

Second, the State's claim that its grounds are a museum is not credible. A museum contains a series of exhibits for a unified purpose, such as art, history, or science. The displays on the Texas grounds are not chosen by a curator for any such purpose. Rather, in Texas it is the legislature that chooses what to place on the grounds; it is a crime in Texas for anyone to place anything on the Capitol's grounds without the Texas legislature's permission and an impeachable offense for a government official to do so. Texas Gov't Code §2165.255.

Every monument on the Capitol's grounds is present because the legislature wanted to express a particular message: remembering the Alamo, honoring war veterans,

honoring children, and remembering Texas' role in the Confederacy. *See* Resp. Br. at 3-4. The Ten Commandments monument is there because the legislature wanted to convey the religious message that it contains.[7]

Finally, if one accepts the State's invitation to examine all the monuments on the Capitol's grounds, it is clear that one is different from all the others. Even by the State's description, only one monument contains sacred text. Only one expresses a religious message. The Ten Commandments monument is different from all the others and this context makes clear that it is an impermissible symbolic endorsement of religion.

3. The content of the Ten Commandments monument.

The content of the monument could not be more religious: a passage of scripture that some religions regard as sacred. At its top, in letters larger than used on the rest of the monument are the words "I AM the LORD thy God." As Justice Stevens explained in speaking of an identical monument, "'I AM the LORD thy God' . . . is rather hard to square with the proposition that the monument expresses no particular religious preference – particularly when considered in conjunction with . . . [the fact] that the monument depicts two Stars of David and a symbol composed of the Greek letters Chi and Rho superimposed on each other that represent Christ." *Elkhart v. Books*, 532 U.S. 1058 (2001) (Stevens, J., opinion respecting denial of certiorari).

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[7] In fact, the State took the monument down in 1990 and kept it in storage until it made the choice to reinstall it in 1993. (Stipulations 10, 11, J.A. at 91-92.) Other monuments have been taken down by the State and not reinstalled, but instead replaced with a small plaque. J.A. at 77.

The State, of course, cannot deny this religious content. Instead, it points to the "civic symbols" on the monument: an eye within a triangle emanating rays of light and an eagle grasping an American flag. But this surely does not change the overall content of the monument. A statue of Christ atop the State Capitol would not become permissible if there also were on it a small eagle grasping an American flag. To the contrary, the presence of the American flag heightens the violation of the Establishment Clause: "it specifically links religion . . . and civil government." *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001).

4. The location, the context and the content of the monument together are a clear symbolic endorsement of religion.

The State and its amici urge this Court to regard the Texas Ten Commandments monument as ceremonial deism, such as "In God We Trust" on coins. In a recent opinion, Justice O'Connor articulated four factors to use in determining whether a religious symbol is "ceremonial deism": "History and ubiquity," "Absence of worship or prayer," "Absence of reference to particular religion," and "Minimal religious content." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2323-326 (2004) (O'Connor, J., concurring in the judgment).

The latter two factors especially explain why the Texas Ten Commandments monument is not ceremonial deism and nothing like "In God We Trust" on coins. The Texas Ten Commandments monument hardly fits the description of "minimal religious content." It is derived from Biblical passages. Exodus 20:2-17, Deuteronomy, 5:6-21. Much of the monument conveys rules for religious behavior: such as, "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images,"

"Thou shalt not take the name of the Lord thy God in vain," and "Remember the Sabbath Day."

Nor does the Texas Ten Commandments monument avoid reference to "particular religions." Not only are the Ten Commandments important to just some religions, but there are symbols of particular religions on the monument: the Greek letters symbolizing Christ and Stars of David.

The State's only attempt to answer this is its statement: "Indeed, the last two *Newdow* factors, in particular, do not fit well in an analysis of government acknowledgments of religion, because, by definition, such acknowledgments will reference religion and have some religious content." Resp. Br. at 43 n.31. But this is true only if the government, as here, chooses to have one religious symbol, by itself, in a prominent place on its property. The State admits, as it must, that under the latter two factors identified by Justice O'Connor in *Newdow*, the Ten Commandments monument is not ceremonial deism because of its expressly religious content and its blatant favoritism of some religions.[8]

[8] As to the first factor, "history and ubiquity," Respondent and especially its amici point to all of the Ten Commandments displays around the country. *See, e.g.*, U.S. Brief at 1a-7a. But as explained earlier, the vast majority of these displays are different from the Texas Ten Commandments monument because they involve the Ten Commandments accompanied by other symbols about the sources of law. Ten Commandments displays of the sort here are relatively new and at most there are a few hundred scattered around the country. Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 236 (2004).

CONCLUSION

Ultimately, this case comes down to two questions. First, are the Ten Commandments a religious symbol and a religious message? Second, may the government place one prominent religious symbol on its property, literally at the seat of its government? The former question was clearly answered in *Stone v. Graham* and the latter by *County of Allegheny v. ACLU*. Based on these precedents, and the long-standing principles they reflect, the decision of the United States Court of Appeals for the Fifth Circuit must be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 26 2005
OFFICE OF THE CLERK

(31)

No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN, PETITIONER

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the display of a monument containing the text of the Ten Commandments on the grounds of the state capitol, where it is part of a series of historic monuments erected on the grounds and where it is clearly demarcated as a private gift to the government, is consistent with the Establishment Clause.

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INTEREST OF THE UNITED STATES

This case concerns whether the display of a privately donated monument of the Ten Commandments, along with a number of other historic and cultural memorials, on the grounds of a state capitol is consistent with the Establishment Clause. In 1986, the Secretary of the Interior designated the Texas State Capitol, including its surrounding grounds, to be a National Historic Landmark. See 16 U.S.C. 461 *et seq.*[1] There are also numerous displays of the Ten Commandments on federal property and in federal buildings. The United States has participated as amicus curiae in prior cases addressing the constitutionality of governmental displays of religious symbols. See *McCreary County* v. *ACLU*, No. 03-1693 (to be argued March 2, 2005); *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

STATEMENT

1. The Texas State Capitol and its surrounding 22 acres of land contain "a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas." Pet. App. 3. The Goddess of Liberty adorns the capitol dome, J.A. 84, and a display in the Capitol Rotunda of the "Six Flags Over Texas" includes the Mexican Eagle and serpent (a symbol of Aztec prophecy), and the Confederate Seal with the inscription "Deo Vindice" ("God will judge"), Pet. App. 3; J.A. 162. The Aztec symbol also appears in a seal on the outside of the Capitol building. J.A. 63. There are currently 17 monuments on the grounds that commemorate "people, ideals, and events that compose Texan identity," Tex. H.R. Con. Res. 38, 77th Leg. (2001). They are: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, the

[1] Although the parties have stipulated that the Ten Commandments monument is an "element" of that Landmark, J.A. 93, the federal government's designation does not extend to the monuments themselves.

Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, the Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. J.A. 117. Numerous commemorative plaques are also displayed. J.A. 121-124, 126-127, 130, 141, 143-145, 148-149, 151-152. Most of the monuments were privately donated. Pet. App. 25 n.4; J.A. 57.

In 1961, the Fraternal Order of Eagles gave the people of Texas a large granite monolith on which is inscribed a "non-sectarian version of the text of the [Ten] Commandments." Pet. App. 4. The top of the monument contains two small tablets bearing an ancient script, separated by an eye inside a pyramid and the image of an eagle grasping the American flag. Two small Stars of David and the superimposed Greek letters Chi and Rho appear near the bottom. *Ibid.* Offset in a decorative, scroll-shaped box is a prominently engraved inscription reading: "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." *Ibid.* It is one of the smallest monuments on the Texas Capitol grounds. See J.A. 87.

Texas accepted the Fraternal Order of Eagles' gift by a Concurrent Resolution, J.A. 97, which noted that the purpose of the donation was to "promote youth morality and to help stop the alarming increase in delinquency," Pet. App. 31 (citation omitted). The resolution "commended and congratulated" the Fraternal Order of Eagles "for its efforts and contributions in combating juvenile delinquency throughout our nation." *Ibid.*[2]

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[2] The donation was part of a nationwide campaign by the Fraternal Order of Eagles to provide troubled youth "with a common code of conduct." See *Books* v. *City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001). Estimates of the total number of monuments donated range from the hundreds to 5,000. See http://www.foe.com/magazine/novdec2004/Nov04_02.pdf; *Mercier* v. *Fraternal Order of Eagles*, No. 04-1321, 2005 WL 81886, at *11 (7th Cir. Jan. 3, 2005). While most of the monuments went on display in the 1950s and 1960s, challenges to their constitutionality do not appear to have arisen (with one exception, see *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973)), until decades later.

The State Board of Control positioned the monument between the Capitol Building and the Supreme Court building, J.A. 101, where it was "continuously displayed on the Capitol grounds" until it was temporarily removed during construction in 1990, J.A. 91. Following the renovation, the monument was reinstalled at its original location, but was repositioned to face toward the West entrance of the Capitol. J.A. 92. That location "was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law." Pet. App. 15. Six other monuments are located in the same quadrant of the Capitol grounds—the Tribute to Texas School Children, Texas Pioneer Woman, th Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, and Soldiers of World War I. J.A. 117. The Statue of Liberty Replica, the Soldiers of World War I, and the Pearl Harbor Veterans memorials can be seen from the area immediately surrounding the Ten Commandments monument. *Ibid.*; http://www.tspb.state.tx.us/SPB/Gallery/ CurrPhoto/3.htm.

2. Petitioner filed suit seeking a declaratory judgment that the display of the Ten Commandments monument violates the Establishment Clause and an injunction requiring the monument's removal. J.A. 12. The district court entered judgment for the respondents. Pet. App. 22-36. The court ruled that, "[v]iewed in the proper context, and in light of its history, this passive monument cannot be said to advance, endorse, or promote religion to a degree that would require the drastic remedy of ordering the [respondents] to remove it from the Capitol grounds." *Id.* at 35.

3. The court of appeals affirmed. Pet. App. 1-18. The court first held that the government's decision to permit the Fraternal Order of Eagles to erect the monument served the

valid secular purpose of "recogniz[ing] and commend[ing] a private organization for its efforts to reduce juvenile delinquency," and that petitioner had identified "nothing in either the legislative record or the events attending the monument's installation to contradict the secular reasons laid out in the legislative record." *Id.* at 9. In fact, "the State's treatment of other monuments on the Capitol grounds belies any * * * suggestion" that the espoused purpose was a sham. *Id.* at 10. In addition, because the monument stood on the Capitol grounds for more than four decades, the court reasoned that the State had a distinct secular purpose in simply "preserv[ing] a longstanding" monument. *Id.* at 16.

The court also ruled that the display did not have the effect of advancing religion because the Ten Commandments monument is just one of 17 monuments displayed on the State Capitol grounds that are "commemorations of people, ideals, and events that compose Texan identity." Pet. App. 13. The court emphasized that information provided by the State to visitors visually treats and discusses the Capitol grounds as a unitary, museum-like display of important historic and cultural influences. *Id.* at 13-14 & n.20. Finally, the court held, "[h]istory matters here," *id.* at 16, and "[e]ven those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country." *Id.* at 14-15. The monument's placement between the legislative chambers, the executive office of the Governor, and the State Supreme Court "plainly linked" the monument with that legal heritage and "these law-giving instruments of State government." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner and his amici advocate the adoption of rigid and sweeping bright-line rules of presumptive constitutional hostility to passive symbolic commemorations of this Nation's religious heritage. Three critical and interrelated considerations require that those arguments be rejected and that

respondents' display of the Ten Commandments monument be upheld.

First, as this Court has repeatedly recognized, the political and legal history of the United States is infused with religious influences, and the Ten Commandments are part of that history. Indeed, the image of the Ten Commandments' arched stones has become a pervasive and ubiquitous symbol in the Nation's art and architecture of law, religion's influence on the law, and religious freedom. Displays of the Ten Commandments thus have a broad "secular dimension as well as a religious meaning." Pet. App. 11.

Second, the surrounding context confirms the display's secular character. One important function of government is to preserve and commemorate the history and culture of its people. As a matter of common practice, state capitol grounds and buildings have become forums in which the public reasonably expects to find memorials to its political and cultural heritage, both religious and secular. The Texas Capitol grounds perform exactly that function. The Ten Commandments monument is only one of 17 memorials to important influences on Texas history and culture, and its location between the State Capitol and the State Supreme Court building underscores its legal symbolism.

Third, the Ten Commandments monument, like most of the monuments on the Capitol grounds, was a privately donated gift to the people of Texas. In belittling the court of appeals' conclusion that respondents' display of the monument reflects respect for the donor, petitioner and his amici overlook the deeply rooted tradition of government receiving gifts and donations on behalf of its citizenry, and the commonsense notion that, for both practical and constitutional reasons, government cannot spurn such gifts or refuse to accord them equal treatment solely because of their religious content. That time-honored custom informs the public's reaction to the display of such gifts. And when, as here, a monument has become such a longstanding and established fixture as to have independent historical significance, its selective

targeting for demolition would bespeak a level of hostility to religion that is antithetical to First Amendment values.

ARGUMENT

THE TEN COMMANDMENTS MONUMENT, AS PART OF A LARGER DISPLAY ON CAPITOL GROUNDS COMMEMORATING STATE HISTORY AND CULTURE, IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

A. Religious Faith Has Played A Defining Role In The History Of The United States

"[R]eligion has been closely identified with our history and government." *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 212 (1963). Indeed, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Id.* at 213. This Court has "asserted pointedly" on five different occasions that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1971); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672 (1970); *Schempp*, 374 U.S. at 213; *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Indeed, as a reflection of their belief that a "Creator" endowed each individual "with certain unalienable Rights," Decl. of Indep., 1 U.S.C. at XLIII, the Framers "conceived of a Federal Government directly responsible to the people * * * and chosen directly * * * by the people," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 821 (1995). Accordingly, in applying the Establishment Clause, "[n]either government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

The Ten Commandments are an important part of that religious heritage. It is "undeniable * * * that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World," including the United States. *Stone* v. *Graham*, 449 U.S. 39, 45 (1980) (per curiam) (Rehnquist, J., dissenting). Indeed, it is widely recognized as a matter of

> historical fact that the Ten Commandments has served over time as a basis for our national law. * * * [A]t least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

State v. *Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995), cert. denied, 516 U.S. 1111 (1996).[3]

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[3] See *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from denial of certiorari) (the Ten Commandments "have made a substantial contribution to our secular legal codes"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part & dissenting in part) (display of Moses with the Ten Commandments as a foundational lawgiver does not violate the Establishment Clause); *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987) (rejecting the suggestion that "the Ten Commandments played an exclusively religious role in the history of Western Civilization"); *Griswold* v. *Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (noting the nexus between "most criminal laws" and the Ten Commandments); *McGowan* v. *Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *ACLU* v. *McCreary County*, 354 F.3d 438, 482 (6th Cir. 2003) (Ryan, J., dissenting) (noting the "indisputable historical role of religion, and especially the canons of the Decalogue, as one of many principles, ideas, values, and impulses that, taken together, influenced the founders of this republic in shaping our law and government"), cert. granted, 125 S. Ct. 310 (2004); *Freethought Soc'y* v. *Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (there is a "well documented history" that "the

At the most basic level, the Ten Commandments underlie the common law prohibitions on murder, adultery, theft, and perjury, which American law carried forward.[4] The Sunday Closing Laws upheld by this Court in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), likewise are directly traceable to the Commandment to keep the Sabbath day, *id.* at 470-495, as well as the constitutional provision that excepts Sundays

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Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity, including the prohibitions against murder and blasphemy"); *King* v. *Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from the[] final six commandments."); *Books*, 235 F.3d at 302 ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."); *Anderson*, 475 F.2d at 33-34 (the Ten Commandments have "substantial secular attributes" and are a "foundation for law").

[4] See, *e.g.*, 1 William Blackstone, *Commentaries on the Laws of England: Of the Rights of Persons* 54 (1765) (Univ. of Chi. Press 1979) (with respect to *mala in se* crimes like murder, theft, and perjury, the legislature "acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts"); 6 *The Works of John Adams, Second President of the United States* 9 (Little & Brown eds., 1851) ("If 'Thou shalt not covet,' and 'Thou shalt not steal,' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."); W. Walsh, *History of Anglo-American Law* 85 (1932) (W. Gaunts & Sons, 2d ed. 1993) (the 1641 Massachusetts "Body of Liberties" made the Ten Commandments "the basis of the criminal law"); Amicus Wallbuilders Br. at 3-25, *McCreary County* v. *ACLU*, No. 03-1693 (chronicling the influence of each Commandment on colonial law governing blasphemy, profanity, idolatry, Sunday closings, murder, adultery, theft, perjury, and defamation); *Freethought Soc'y*, 334 F.3d at 267-268 (linking the prohibition on taking the Lord's name in vain to "so help me God" in oaths); *Hollywood Motion Picture Equip. Co.* v. *Furer*, 105 P.2d 299, 301 (Cal. 1940) ("'Thou shalt not steal' applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel."); *Watts* v. *Gerking*, 228 P. 135, 141 (Or. 1924) ("'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by statute as a felony.") (citation omitted); *Weinstock, Lubin & Co.* v. *Marks*, 42 P. 142, 145 (Cal. 1895) (prohibition on covetousness linked to intellectual property law).

from the ten-day period for exercise of the presidential veto. U.S. Const. Art. I, § 7.[5]

At a more general level, the Ten Commandments reflect and have become symbolic of the historical reality that many early efforts at regulating human conduct had religious origins. "The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained many statutes * * * of universal application—laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws." *Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings* 61 (James M. Alden ed., 1850). In particular, the Ten Commandments "served as a foundation for the formation of both English Common Law and the Napoleonic Code, which together laid the foundation for American jurisprudence." *Books* v. *City of Elkhart*, 235 F.3d 292, 312 (7th Cir. 2000) (Manion, J., concurring in part and dissenting in part), cert. denied, 532 U.S. 1058 (2001). The Commandments also have come to be understood as "a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people," Pet. App. 17, and in that respect have a nexus to our national history. Indeed, in 1997, the House and Senate passed concurrent resolutions acknowledging that (i) "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization," (ii) "the Ten Commandments set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society," and (iii) "the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society." S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess. (1997). "No judicial decree can erase that history and its continuing influence on our laws." Pet. App. 17.

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[5] See *City Council* v. *Benjamin*, 33 S.C.L. 508, 523 (S.C. Ct. App. 1848); *Kountz* v. *Price*, 40 Miss. 341 (1866).

B. Government May Commemorate The Decalogue's Influence On American History

1. The Ten Commandments are a ubiquitous and commonly recognized symbol of law

There "is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *Lynch*, 465 U.S. at 674, and "references to the Almighty [have] run through our laws, our public rituals, [and] our ceremonies" since the founding of the Country, *Zorach*, 343 U.S. at 313. The First Congress—the same Congress that drafted the Establishment Clause—adopted a policy of beginning each session of Congress with prayer. See *Marsh*, 463 U.S. at 787. Since the time of Chief Justice Marshall, this Court has opened its sessions with "God save the United States and this Honorable Court." *Engel* v. *Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). In 1865, Congress authorized the inscription of "In God we trust" on United States coins, Act of March 3, 1865, ch. 100, § 5, 13 Stat. 518, and, in 1956, made that same phrase the National Motto, see 36 U.S.C. 302. The Great Seal of the United States includes the inscription *Annuit Coeptis*, which means "He [God] has favored our undertakings." J.A. 181-182. Indeed, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in the judgment).[6]

[6] See also *Elk Grove*, 124 S. Ct. at 2317 (Rehnquist, C.J., concurring in the judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954)); *id.* at 2320 ("From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance.").

Reproductions and representations of the Ten Commandments have been commonly employed in courthouses and state houses across the Country to symbolize the rule of law and the role of religion in the development of American law. That is due, in significant part, to the Decalogue's substantively influential role in legal history. But the ubiquity of the Ten Commandments image in monuments, art, and architecture also reflects the widespread value of the arched stones as a popular symbol of the law. Whether or not one subscribes to the Judeo-Christian faith traditions, the image of the twin arched stones alone evokes instantaneous and almost universal recognition within the United States as an image of the rule of law.[7] Indeed, Moses with the Ten Commandments appears, alongside other historic lawgivers, in a frieze within the chamber of this Court, as well as on the east facade of the Supreme Court building. The main reading room of the Library of Congress includes a painting of a woman praying, with the Ten Commandments by her side. The National Archives has embossed on the marble floor of its main display room a bronze seal that includes the image of two arched stones, representing the "10 Mosaic commandments on which the laws of our nation are based." Agnes Trimble, *Washington's Shrine Draws Throngs*, The Evening Star, Oct. 9, 1937, at B1. An informal and non-exhaustive survey identified displays of the Ten Commandments in almost every State. See App., *infra*; see also *ACLU* v. *McCreary County*, 354 F.3d 438, 482 (6th Cir. 2003) (Ryan, J., dissenting) (noting "[t]he history and ubiquity of the Ten Commandments in public buildings throughout the country").

Popular recognition of the Ten Commandments image also has made it a commonly employed emblem of religion and religious freedom. The statue of Moses holding the Ten

[7] See, *e.g.*, *King*, 331 F.3d at 1278 ("the outline of the Ten Commandments" has been employed historically to "enable[] illiterate citizens to recognize the legal validity of documents").

Commandments in the rotunda of the Library of Congress represents "Religion" in a gallery of images dedicated to valued pursuits. See C. Caffin & A. Spofford, *Handbook of the New Library of Congress in Washington* 64-65 (1897). In addition, a monument at the Ronald Reagan International Trade Building in Washington, D.C., depicts a female figure, her hands clasped in prayer, reclining against a tablet bearing the Ten Commandments, with the inscription "Liberty of Worship is Not a Concession nor a Privilege but an Inherent Right." See http://www.itcdc.com/explore.phy?p=4.[8]

In short, as a symbol of law, of religious influences on the development of American law, and of religious freedom, the image of the Ten Commandments is so commonly employed and so widely recognized that it has become "part of the fabric of our society." *Marsh*, 463 U.S. at 792; see *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part) (a display of "Moses holding the Ten Commandments, [even] if that is the only adornment on a courtroom wall, conveys an *equivocal message*, perhaps of respect for Judaism, for religion in general, or for law") (emphasis added). "Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove*, 124 S. Ct. at 2322.

2. The Establishment Clause permits the inclusion of passive religious symbols in broader historical and cultural displays

That uninterrupted pattern of official recognition of the role that religion, including the Ten Commandments, has played in the foundation of the Country, the formation of its governmental institutions and legal system, and the cultural and moral heritage of its people, counsels strongly against

[8] See also James Goode, *The Outdoor Sculpture of Washington, D.C.: A Comprehensive Historical Guide* 222 (1974) (sculpture outside the United States Court of Appeals for the District of Columbia Circuit of a kneeling woman, a man standing before a cross, and the Ten Commandments represents religious freedom).

construing the Establishment Clause to forbid respondents' display. And, in fact, this Court has twice considered and twice sustained governmental displays that similarly integrate overtly religious symbols with secular symbols of the Nation's heritage and culture.

In *Lynch* v. *Donnelly*, *supra*, the Court held that the Establishment Clause permits a city to include a nativity scene as part of a display that comprised "many of the figures and decorations traditionally associated with Christmas." 465 U.S. at 671. "[D]epict[ing] the historical origins of [a] traditional event long recognized as a National Holiday," the Court concluded, served a valid, secular goal. *Id.* at 680. In so holding, the Court refused to "focus[] almost exclusively on the creche," considering it sufficient that the display as a whole "principally take[s] note of a significant historical religious event long celebrated in the Western World." *Ibid.*

The Court further held that inclusion of the sectarian symbol in the display did not have the effect of advancing religion because any benefit to "one faith or religion or to all religions[] is indirect, remote and incidental," and "display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683. The court stressed that the creche is a "passive symbol," indistinguishable from "a host of other forms of taking official note of * * * our religious heritage." *Id.* at 686. To forbid such displays "would be a stilted overreaction contrary to our history and to our holdings." *Id.* at 686.

Likewise, in *County of Allegheny* v. *ACLU*, *supra*, the Court sustained the inclusion of a menorah as part of a holiday display that included a Christmas tree and a sign saluting liberty. 492 U.S. at 614. A plurality concluded that, considered as a whole, the display did not amount to an "endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619. Justice O'Connor concurred, ex-

plaining that, "[a]lthough the religious and indeed sectarian significance of the menorah is not neutralized," the "particular physical setting" in which the menorah appeared "changes what viewers may fairly understand to be the purpose of the display." *Id.* at 635 (internal quotation marks and citations omitted). Justice Kennedy, along with the Chief Justice, Justice White, and Justice Scalia, also concluded that the display was constitutional, because "the city and county sought to do no more than celebrate the season * * * and to acknowledge * * * the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays." *Id.* at 663.

Moreover, in *Stone* v. *Graham*, *supra*, the Court recognized that the Ten Commandments may constitutionally be employed, even in the school context, when "integrated into the * * * curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. In that case, the Court held unconstitutional a state statute that required the posting of the Ten Commandments by themselves on the wall of public school classrooms. But that "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987).[9]

Notably, in none of those cases did the Court apply the strict scrutiny that petitioner advocates (Br. 19-20), despite the sectarian content of the creche and menorah. That is because acknowledging religion's influence on culture and history in the same manner that other important social

[9] See also *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (posting the Ten Commandments "plainly ha[s] some secular objectives, such as instilling most of the values of the Ten Commandments and illustrating their connection to our legal system") (citations omitted); *Books*, 532 U.S. at 1061 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) ("[W]e have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application.").

influences are commemorated demonstrates governmental neutrality toward, not advancement of, religion. Furthermore, religion is an undeniable and undeniably important part of American history that heavily influenced the design and development of the Nation's government and laws. To be sure, some religions have played a more prominent role in that history than others. But the Establishment Clause is not offended by such references because *acknowledging* the historic fact of those faith traditions' weighty influence on governmental design and culture is not the same as *endorsing* those religions. Just as one can readily acknowledge the profound influence of faith on the work of Dr. Martin Luther King or Johann Sebastian Bach without subscribing to or propounding their theology, government's commemoration of religious influences on American history does not amount to endorsement of those faiths. To declare, as petitioner advocates, every acknowledgment of religion's influence to be presumptively invidious and constitutionally suspect, and thus subject to the most exacting judicial scrutiny, would effectively render governmental commemoration of that defining aspect of the Nation's heritage taboo. "It is far too late in the day to impose [that] crabbed reading of the Clause on the country." *Lynch*, 465 U.S. at 687.[10]

C. Respondents' Display Serves A Legitimate Secular Purpose

Government action runs afoul of the purpose inquiry only if it is "entirely motivated by a purpose to advance religion." *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985), see *Lynch*, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"). No such showing was made here.

[10] Strict scrutiny should be reserved for governmental programs like those at issue in *Larson* v. *Valente*, 456 U.S. 228 (1982), that actively classify, compel, or coerce individual behavior on sectarian lines. Passive displays that simply commemorate culture and history and that passersby are free to ignore do not inherently warrant such judicial suspicion.

1. The display honors the donor on fair and equal terms

Respondents' continued display of the Ten Commandments monument serves the valid secular purpose of honoring the important and publicly beneficial work of the Fraternal Order of Eagles, in the same way that Texas honors other entities by accepting and retaining their donated monuments. The historic record is undisputed. The Concurrent Resolution accepting the monument explained that the Fraternal Order of Eagles was donating the monument to Texas "to promote youth morality and to help stop the alarming increase in delinquency," and that Texas accepted the monument and permitted its display specifically to "commend[] and congratulate[]" the Fraternal Order of Eagles "for its efforts and contributions in combating juvenile delinquency throughout our nation." J.A. 97. Tellingly, the State Preservation Board's map of the installation site refers to it as the "Eagles Monolith," rather than the "Ten Commandments monument." J.A. 102. That the monument is situated in the same general area as other memorials focusing on family and children—the Tribute to Texas School Children, Texas Pioneer Woman, and the Boy Scouts' monument, J.A. 95, 134-137—underscores that the Fraternal Order of Eagles' work with children underlay acceptance of the monument. See Pet. App. 6 ("[W]ith its proximity to the pioneer woman holding a child and to the figures of children at play, it would be seen as a fit location to express appreciation for the work of the Eagles with American youth.").

Despite that record, petitioner insists (Br. 21) that the stated purpose was a "sham" and that the State's true desire was "to express and exalt this religious text." The short answer is that four out of four judges who examined the record in this case found otherwise. Pet. App. 9-11, 16, 31; see also *Freedom from Religion*, 898 P.2d at 1024. Texas's similar expressions of respect in accepting other donated monuments confirm the point. See Tex. S. Con. Res. 4, 52d Leg., 1951 Tex. Gen. Laws 1495, 1495 (accepting Statue of Liberty replica "in honor of the Boy Scouts of America," and "to honor the youth of Texas who are members of the * * * Boy Scouts of America"); Tex. H.R. Con. Res. 180, 66th Leg., 1979 Tex. Gen. Laws 3168 (accepting the Disabled American Veterans Memorial to "express appreciation to Disabled American Veterans, Department of Texas, for the organization's magnanimous and patriotic gift").

Petitioner insists (Br. 21) that "accepting a gift from an organization is a dubious way of honoring it." That is wrong. Government officials frequently receive, on behalf of their government and citizens, gifts from other governments and non-governmental entities. Indeed, gift exchanges are such an entrenched and integral part of the dialogue of international relations that the Constitution refers to the practice, see U.S. Const. Art. I, § 9, Cl. 8, and the State Department has an entire office—the Office of Protocol—dedicated to receiving from and offering gifts to foreign representatives and governments, a significant percentage of which have religious content.[11] Those gifts are routinely accepted and sometimes displayed by the President and other federal officials, not as an endorsement of the religious messages they contain, but as a time-honored means of demonstrating respect for the donor.[12]

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[11] See, *e.g.*, 49 Fed. Reg. 46,326, 46,328, 46,331, 46,373 (2004) (gifts to federal officials have included a plate bearing verses from the Quran, a silk rug depicting the crucifixion of Jesus Christ, a medallion bearing the image of Francis of Assisi, and a wooden plaque depicting the Last Supper).

[12] See 5 U.S.C. 7342(c)(1)(B); S. Rep. No. 1160, 89th Cong., 2d Sess. 3-4 (1966) ("for centuries," "foreign nations * * * [have] deemed the exchange of gifts and decorations a standard mark of courtesy, and refusal to accept a mark of discourtesy, amounting at times even to an insult or an affront"); H.R. Rep. No. 2052, 89th Cong., 2d Sess. 1-2, 3 (1966) ("The tender of such gifts and decorations is an old and well-established practice that antedates the foundation of the United States. It is made as a mark of esteem and appreciation by a foreign government and signifies that the

Similarly, privately donated stone blocks, with dimensions only slightly smaller than the Texas monument, were used to complete the Washington Monument on the National Mall. Stones donated by the State of Deseret and by Sunday School children contain sectarian religious inscriptions, such as "Holiness to the Lord" and "suffer the little children to come unto me."[13] The federal government's acceptance and retention of those stones within the Washington Monument cannot plausibly be characterized as endorsing the religious faith they reflect. Rather, by according those gifts the same treatment as other donated stones, the government simply demonstrates respect and gratitude for the generosity of the donors and celebrates the diversity of contributors' expression. At the same time, refusal to accept the stones donated by Sunday School children (or, more accurately, selectively curtaining them or expurgating their inscriptions) solely because of their religious speech would demonstrate a level of official antipathy to religion that is alien to the First Amendment.

And so it is here. Texas has done nothing more than accept and display the gift of the Ten Commandments monument on the same terms and in the same manner as other donated monuments that were consonant with the Capitol grounds' secular theme of historic and cultural influences on the State. The record contains no evidence that government officials solicited a religious donation, exercised control over its content or design, rejected any other monuments on religious (or any other) grounds, or have given selective prominence or attention to its religious message. It would be "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access * * * that all

individual so honored has contributed in some small measure to more amicable relations between the United States and the foreign government.").

[13] See George Olszewski, *A History of the Washington Monument, 1844-1968* 12 (1971); http://www.nps.gov/wamo/memstone.htm (discussing stones with religious inscriptions measuring 5.6 feet by 3 feet).

other displays enjoy." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 763-764 (1995) (plurality).[14]

2. The display commemorates the Decalogue's influence on law

The display of the Ten Commandments monument on a line between the State Capitol and the State Supreme Court —buildings devoted to the development of the law—also serves the valid secular purpose of memorializing the Decalogue's influence on American law. The Establishment Clause does not proscribe the government from "taking official note of * * * our religious heritage," *Lynch*, 465 U.S. at 686, or depicting with a religious symbol "the historical origins" of attributes of the Nation's character, *id.* at 680. Such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," *id.* at 686, is consistent with the Establishment Clause because it simply takes note of the historical *facts* that "religion permeates our history," *Edwards*, 482 U.S. at 607 (Powell, J., concurring), and that religious faith played a singularly influential role in the settlement of this Nation, the founding of its government, and the development of its laws.

Petitioner (Br. 24-26) and a number of his amici challenge the notion that the Ten Commandments played such an influential role in legal history. That argument misses the mark in three respects. First, the issue is whether respondents have a secular purpose for accepting and displaying the Ten Commandments monument, not whether all scholarly and theological debate on the subject of the degree of the Decalogue's influence has been eliminated. It is sufficient that respondents share the secular view of numerous Justices of this Court, judges, Congress, academics, histori-

[14] See also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 249 (1990) ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion.") (quoting *Wallace*, 472 U.S. at 56).

ans, architects, and Framers themselves, see pages 7-9, *supra*, that the Ten Commandments influenced the development of American law. The mere existence of debate about the degree of that influence does not disprove either the sincerity or the secular character of respondents' avowed and legislatively documented purpose.[15]

Second, even if other legal codes also contributed to the development of the law, petitioner fails to account for the practical reality that the image of the Ten Commandments is a uniquely potent and commonly recognized symbol of the law. Whatever the relative influence of Hammurabi or Teutonic customs on the United States, there is no other historic symbol for the law that has the same currency and resonance with the general public as the image of the Ten Commandments.

Third, petitioner contends (Br. 24-25) that only some of the Commandments directly influenced modern legal prohibitions. Notably, that argument concedes the historical relevance of the Commandments at some level. Beyond that, petitioner significantly understates the nexus between the Commandments and American law. See pages 8-9 & notes 4-5, *supra*. More importantly, the implications of his argument are untenable. The monument at issue contains all Ten Commandments; it is not an isolated display of the three or four most overtly religious Commandments. Because of the symbolic potency of the Ten Commandments and the linkage between many of the Commandments and American law, there are sound secular reasons for displaying the Commandments—all ten—in some manner. Given that, the Establishment Clause surely does not require ignoring that this debate is about the Decalogue, not a septalogue. Nor does it confine government displays to only the "Six or

[15] See *County of Allegheny*, 492 U.S. at 613-614 & n.60 (discerning secular purpose for displaying a menorah, despite enduring debates over the religious and cultural significance of the Chanukah holiday and the appropriateness of using the menorah as a secular symbol); *id.* at 678 (Kennedy, J., concurring in part and dissenting in part).

Seven Commandments," with sand-blasted redactions or governmentally chiseled ellipses of the rest. As petitioner's amici explain (Baptist Joint Comm. Br. 9), "[t]he two Tables of the Commandments are a unified whole," and it is the unified whole that has resonance as a symbol of the law. In permitting government to acknowledge the influence of religion on American history, the Establishment Clause is not so grudging as to compel an ahistorical redaction of influential religious text.[16]

3. The display has independent historical value

Whatever Texas's original motivation for displaying the Ten Commandments monument in 1961, the constitutionally relevant inquiry in a suit for equitable relief brought more than four decades later is whether respondents have a valid secular purpose for retaining the monument. Those secular purposes include not just demonstrating respect and equal treatment for the donor and commemorating the Decalogue's influence on the law, but also the natural desire to keep a historic landmark intact and to avoid the message of hostility to religion that would be conveyed by razing a longstanding monument based on the belatedly voiced sentiment that it is too religious. The Texas Capitol, including its grounds, is a National Historic Landmark, and the parties have stipulated that the Ten Commandments monument "is one element" of that landmark, J.A. 93. Thus, with the passage of time, the Ten Commandments monument "has become part of the history" of the Texas Capitol, *Freethought Soc'y* v. *Chester*

[16] Petitioner imputes (Br. 24) to respondents an unconstitutional purpose based on the fact that the prefatory words "I AM the LORD thy GOD," appear in a larger font than the rest of the monument's text. But the design pattern chosen by the Fraternal Order of Eagles nearly half a century ago says nothing about respondents' purpose for displaying the monument today. In any event, that language is no more religious than other governmentally employed phrases the isolated usage of which this Court has repeatedly indicated are constitutional, such as the National Motto, "In God we Trust", or the daily courtroom cry of "God Save the United States and this Honorable Court."

County, 334 F.3d 247, 266 (3d Cir. 2003), investing the monument with independent value as an integral and visually ingrained component of the historic Capitol landscape. The "desire to preserve a longstanding [monument]" is a valid secular purpose. *Id.* at 251.

Petitioner notes (Br. 22) that the monument was put in temporary storage during a three-year reconstruction project and then reinstalled in 1993 at its original site and reoriented to face a newly constructed sidewalk. That is true, J.A. 50, 91-92, but such commonplace architectural judgments do not amount to endorsing the "content of the monument" (Pet. Br. 22). The starting presumption is that respondents acted lawfully, and petitioner cites nothing in the record suggesting otherwise.[17] Nor is there any logical reason why repositioning a monument to correspond with renovations should be suspect. The decision to reorient the monument was not inconsistent with how other monuments were reinstalled, nor was the monument given any special prominence.[18] Treating the Ten Commandments monument in the same manner and on the same objective architectural terms as all the other monuments affected by the renovation demonstrates evenhandedness, not endorsement.[19]

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[17] See *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that these school officials will act in good faith."); *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983) (the Court has been "reluctan[t] to attribute unconstitutional motives to the States, particularly where a plausible secular purpose for the State's program may be discerned from the face of the statute").

[18] Petitioner emphasizes (Br. 22) that some monuments were not reinstalled after the renovation. That development actually occurred a few years later when respondents conformed the Capitol grounds' to its original historical design during the period 1888-1915. See State Preservation Bd., *Master Plan, Historic Grounds of the Texas Capitol* 51-53 (1995). Under that Plan, monuments outside the grounds' original precincts were retained only if they were erected within 50 years of 1915. *Id.* at 53, 75, 77; J.A. 49. Thus the neutral fact of age, not consideration of content, dictated which monuments were retained.

[19] In any event, in the context of passive and inherently non-coercive governmental displays in non-school settings, an inquiry into the subjective purpose of governmental actors rather than the objective purpose served by the display is of dubious value. See U.S. Br. at 26-27, *McCreary County* v. *ACLU*, No. 03-1693. That is particularly so when the decision to install the display occurred decades before the lawsuit and involved government officials long departed from the scene

D. Respondents' Display Has A Valid Secular Effect

1. As part of the entire Capitol grounds display, the monument symbolizes law and commemorates religion's influence on the legal system

The "crucial" consideration under the Establishment Clause is whether respondents' display "ha[s] the effect of communicating a message of government endorsement or disapproval of religion" to an objective observer. *Lynch*, 465 U.S. at 692; see *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000). That objective observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring). Petitioner thus errs at the outset (Br. 35-39) in arguing about the effect of the Ten Commandments monument in isolation. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680.

Placed in context, the Ten Commandments monument does not endorse religion. First, the Ten Commandments monument appears on the grounds of the State Capitol, between the Texas Supreme Court building and the building that houses Texas lawmakers, which is a setting where the image of the Ten Commandments is commonly encountered and is understood as a secular symbol of law and religion's influence on the American legal system. With those surroundings, the Ten Commandments monument would be understood in the same context as the prayer that begins the legislative day itself, see Tex. H.R. Rule 6, § 1(3), and the opening cry of the Texas Supreme Court, "God save * * * this Honorable Court." Such "manifestations in our public

life of belief in God," *Engel*, 370 U.S. at 435 n.21, and of religion's influence on our Nation, far from violating the Constitution, have become "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and are reasonably understood as such by viewers.

Second and more generally, capitol grounds are a location where visitors expect to find monuments and memorials commemorating a broad variety of historical and cultural influences, both religious and secular. In fact, the Texas Capitol grounds "are an extension of the living museum that is the capitol [building]." J.A. 23. The Ten Commandments monument is just one of 17 different "statues, memorials, and commemorations of people, ideals and events that compose Texan identity," Pet. App. 13, and it is displayed in the same manner and on the same terms as other memorials; it receives no unique or disproportionate emphasis.

Third, the Establishment Clause must take account of government's frequent and sensitive role as a recipient of gifts and tributes to the people of the State. When, as here, a display is clearly demarcated as a gift, see Pet. App. 21, viewers are reasonably charged with understanding that the government did not design the monument and that its display, in significant part, reflects respect for the donor.[20]

Just as important, the effects test must take into account the practical impact of compelling the razing of longstanding donated memorials because, decades later, the monument is decreed to be too religious. The selective and targeted demolition of a monument that has been part of the Capitol grounds for 40 years just "because it's religious" would con-

[20] See *County of Allegheny*, 492 U.S. at 619 (Blackmun, J.) ("[A]n explanatory plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs."); *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he presence of a sign disclaiming government sponsorship or endorsement on the Klan cross * * * would make the State's role clear to the community.").

vey a profound message of hostility to religion that is itself antithetical to the very purpose of the Establishment Clause. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 122 (2001) (Scalia, J., concurring) (citation omitted). Accordingly, whatever factors might have influenced a challenge to the initial installation, a challenge to the failure to include another monument reflecting the contributions of a different religion, or a suit seeking a clearer attribution, a decision to order such a monument removed or a frieze obliterated cannot ignore the Establishment Clause impact of that state action. In that regard, the history of this display in particular, and of public displays that include religious content more generally, is keenly relevant. Just as discontinuing the prayer in *Marsh* would have a different impact than enjoining a new plan to start such a prayer in a different forum, razing a monument that has stood for decades sends a clear message of hostility to religion, which is not something the Establishment Clause sanctions, let alone requires. The First Amendment does not compel "callous indifference to religious groups," *Zorach*, 343 U.S. at 314, or require government to treat religion "as subversive of American ideals," *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

Finally, just as the reasonable observer in *Capitol Square* was charged with the knowledge that those capitol grounds were a public forum, see 515 U.S. at 763-765; *id.* at 780-781 (O'Connor, J., concurring), observers must be deemed aware that the Texas Capitol, including its grounds, is a National Historic Landmark, and that the government's continued display of longstanding monuments on such grounds serves the distinct public interest in preserving a historically and culturally significant landscape, *id.* at 781 (the "hypothetical observer also should know the general history of the place"). That is because "history provides a context which changes how the reasonable observer would regard the [monument]." *Freethought Soc'y*, 334 F.3d at 265.

Petitioner contends (Br. 29) that the Court should evaluate the monument's constitutionality based solely on what is "visible when standing before it." That makes no sense logically or jurisprudentially. First, as petitioner himself acknowledges (Br. 35), there are four other monuments in the "immediate vicinity" of the Ten Commandments monument —monuments that thematically coincide with the Fraternal Order of Eagles' focus on children and "ethics and the ideal of a just society." Pet. App. 15. Surely those displays are constitutionally relevant.

Second, nothing in logic or common experience commends adoption of such a cramped frontal-vision test. Visitors to state capitol grounds presumably are interested in a comprehensive tour of the site rather than a brief sally to a single monument. Nor does anything in the record suggest that those who go to the Capitol grounds to conduct business routinely encounter nothing but the Ten Commandments monument, or are otherwise under the misimpression that the monument is some sort of unique and solitary tribute. The brochure of the Capitol grounds that Texas provides discusses the area as a unitary whole, J.A. 112-120, 204-209, and that information, along with the signage that accompanies each memorial, see Def. Exh. 44 at trial (videotape of capitol grounds); J.A. 40, integrates each monument into a larger story about Texas history and culture.

Third, this Court's precedent forecloses petitioner's test. In *Capitol Square*, this Court upheld the display of a cross on capitol grounds, reasoning that observers were charged with knowledge that other unattended displays long since departed from the scene—holiday displays of a Christmas tree and a menorah, a United Way fundraising sign, and exhibits during an arts festival, 515 U.S. at 758—had been permitted on equal terms in that public forum. If the Constitution charges visitors to state capitol grounds with such temporal perspicaciousness, it also can require them to turn their heads and look down the sidewalk, or at least to read the whole capitol grounds brochure before jumping to the

conclusion that a constitutional violation is afoot. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655-656 (2002) (in upholding a school-choice program that included sectarian schools, the Establishment Clause inquiry considered all educational programs available to students, not just the challenged program); *id.* at 672-673 (O'Connor, J., concurring).[21]

What should be controlling in this case is not hypothesized vision tests, but the *legal and factual reality* that (i) the Ten Commandments has an established secular symbolism in representing the law and commemorating religion's influence on the law and government, (ii) the monument has a logical nexus to the location in which it appears in that capitol grounds commonly contain an array of plaques, memorials, and artistic and architectural depictions of influences on the law, (iii) the monument is displayed as part of a larger presentation of historical and cultural influences, and (iv) the Ten Commandments are displayed in the same manner and on equal terms with other monuments or memorials. That focus on equal treatment of speech with religious content and its logical nexus to the purposes of the forum in which it appears has been constitutionally controlling in cases involving active, proselytizing religious speech and the use of substantial governmental resources.[22] No more stringent constitutional test should govern the constitutionality of passive displays of religious speech on public property.

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[21] Petitioner's reliance (Br. 36) on the isolated and elaborate creche display in *County of Allegheny* is misplaced. In that case, the creche appeared by itself in "[t]he main, most beautiful, and most public part of the courthouse," 492 U.S. at 579, and there were no other remotely comparable displays—in terms of content or presentation—anywhere in the courthouse. The Court's refusal to focus exclusively on the menorah is the more relevant lesson of *County of Allegheny*.

[22] See, *e.g.*, *Good News Club*, *supra* (equal access to limited public forum for Christian educational organization); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (equal funding of sectarian student newspaper); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (provision of state-financed sign language interpreter to parochial school student).

2. *The monument does not reflect sectarian discrimination*

Petitioner (Br. 42) and his amici argue that the Ten Commandments monument is unconstitutional because there is a lack of consensus between faiths on the wording and ordering of the Commandments. As an initial matter, that argument does not call into question the constitutionality of the numerous federal displays of the Ten Commandments that appear without text, with Hebrew or other ancient script, or with Roman numerals.

That being said, the Establishment Clause simply does not differentiate between textual and non-textual (or non-English) depictions of the Commandments. The Court has said time and again that the Establishment Clause permits government to acknowledge the Nation's religious heritage, and it would distort that principle to hold that any acknowledgment of the Ten Commandments' influence must exclude completely the text of the Commandments, when that text is the very reason the Commandments are relevant to American history.

In addition, petitioner's argument ignores the context and character of the display. For example, sectarian disputes over the proper translation of the Bible are widespread. But that does not mean that the display of the Gutenberg Bible (Vulgate translation) in the Library of Congress or the display of the Bible (King James version) used by George Washington at his inauguration reflects a governmental endorsement of the particular translation exhibited. The setting in which such displays occur dispels any linkage between the sectarian content and governmental endorsement. So it is here. The prominent sign on the monument makes clear that respondents did not choose the script for the monument; the Fraternal Order of Eagles did. See *Summum* v. *City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002) ("[T]he Eagles are properly considered the 'literal speaker' of the speech contained on the Monument."). No symbol or

seal of the government appears anywhere on the monolith. J.A. 95. Set against the backdrop of the other donated memorials spread across the Capitol grounds, no reasonable viewer would interpret the Ten Commandments display as an overt or covert effort by the government to take sides in a theological dispute. Any residual "benefit there is to one faith or religion" is "indirect, remote and incidental," and thus is not of constitutional moment. *Lynch*, 465 U.S. at 683; see *Elk Grove*, 124 S. Ct. at 2322 (O'Connor, J., concurring) ("Facially religious references" are permissible when "employing the idiom for essentially secular purposes.").[23]

Finally, if universal sectarian agreement is a constitutional prerequisite for government to acknowledge important religious influences, then nothing will pass Establishment Clause muster. As petitioner notes (Br. 7), there are "prominent religions" that "reject the * * * view that there is [the] single God" referenced on United States currency and in the National Motto. The display of a creche is profoundly sectarian, and there is a lack of universal consensus even among those who believe in the divinity of Jesus Christ on the appearance and display of Nativity scenes, or whether Christmas should be celebrated as a holiday at all.

The Ten Commandments significantly influenced the development of American law, and they have become a commonly recognized symbol of the law and religion's influence on it. But if the arguments of petitioner and his amici are accepted, the Commandments can never be displayed in any manner because not all faiths subscribe to the theology from which they derive. On the other hand, if the Commandments can be displayed constitutionally notwithstanding such sectarian disagreement, then the existence of continuing debate between different sects over the precise text should not

---

[23] The Fraternal Order of Eagles, for its part, attempted to present a nonsectarian version of the Commandments, so that the selected text cannot be "identified with any particular religious group." *Freedom from Religion Found.*, 898 P.2d at 1017.

foreclose displays like respondents either, as long as the surrounding context and manner of presentation adequately dispel any message of particularized endorsement. By clearly demarcating the monument as a gift, by displaying it in the same manner and on the same terms as a variety of other donated monuments commemorating state history and culture, and by situating the monument in a location that "honors its secular strength" (Pet. App. 17) and underscores its secular nexus to the law, respondents' retention of the Ten Commandments monument as part of their historic Capitol grounds comports with the Establishment Clause. The overall message conveyed by the monument in context is far more consistent with Establishment Clause values than the message that would be conveyed by tearing this longstanding monument down.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2005

Alabama: A small plaque of the Ten Commandments hangs inside the State Capitol. See National Briefs, Miami Herald, Sept. 10, 2003, at 19, *available at* 2003 WL 62530915.

Alaska: The city council chambers in Fairbanks has a depiction of the Ten Commandments. See http://atheism.about.com/b/a/074472.htm?terms=fairbanks.

Arizona: A monument of the Ten Commandments sits on state park land in Wesley Bolin Plaza, just east of the Arizona state capitol in Phoenix. See *Arizonans to Rally for Ten Commandments; Hundreds Expected to Gather, Pray to Call for an End to Judicial Tyranny*, U.S. Newswire, Sept. 22, 2003, *available at* 2003 WL 55662538.

Arkansas: The Ten Commandments are posted in a courtroom in Maumelle County. See *Maumelle Candidates Fail to Leap Out Front*, Arkansas Democrat Gazette, Nov. 3, 2004, at 17, *available at* 2004 WL 96720618.

California: There is a depiction of Moses holding the Ten Commandments over the western entrance to the Los Angeles Superior Court. See http://mayitpleasethecourt.net/journal.asp?blogId=33; http://www.heydaybooks.com/public/books/ccreview1.html.

Colorado: There is a Ten Commandments monument on the lawn of the State Capitol in Denver. There is a similar monument on the lawn in front of the city hall in Grand Junction. See http://www.casperstartribune.net/articles/2003/10/28/news/casper/7a6415c2e299679a2c564c072113f7e6.txt.

Delaware: A framed copy of the Ten Commandments hangs on the wall in the council chamber in the Sussex County administrative office building.

District of Columbia: Both the United States Court of Appeals for the District of Columbia Circuit and the

Supreme Court have Ten Commandments displays in their courtrooms. The National Archives has a display of the Ten Commandments on the floor of its entryway. See Affidavit of David Barton, *Doe* v. *Harlan County Sch. Dist.*, Civ. No. 99-508 (E.D. Ky. 2001), *available at* http://wallbuilders.com/resources/search/detail.php?ResourceID=41. Displays also appear in the Library of Congress and outside of the Ronald Reagan International Trade building.

Florida: In the lobby of the Polk County Administrative Building is a 7-foot, 6-inch monument depicting the Ten Commandments and other documents. See http://www.thomasmore.org/news.html?NewsID=121.

Georgia: The seal of the clerk of the Superior Court in Richmond County contains an outline of the Ten Commandments. See *King* v. *Richmond County*, 331 F.3d 1271 (11th Cir. 2003). The courthouses in Barrow County and Hart County have framed copies of the Ten Commandments outside their courtrooms. See Across Georgia, Augusta Chron., Nov. 8, 2004, at B03, *available at* 2004 WL 96282513.

Idaho: The City of Post Falls has a monument on the lawn in front of its City Hall. There appear to be monuments bearing the Ten Commandments on the lawn on the eastside of the courthouse in Coeur d'Alene and in a park near the City Hall in Hayden. See Erica Curless, *Commandments Abound in Idaho; Low-key Monuments in Public Spaces Seem Unlikely to Inspire Lawsuits*, The Spokesman-Review, Sept. 2, 2003, at A1, *available at* 2003 WL 57389325.

Illinois: There is a mural in the State Supreme Court library that depicts stone tablets with Hebrew written on them.

Indiana: The Washington County courthouse has a display of the Ten Commandments.

Iowa: There is a monument of the Ten Commandments in a plaza by the city hall in Cedar Rapids.

Kansas: There is a stone monolith in front of a municipal building in Junction City. See http://www.kstatecollegian.com/article.php?a=3321.

Kentucky: Displays at issue in *McCreary County, Ky.* v. *ACLU*, No. 03-1693.

Louisiana: A framed copy of the Ten Commandments hangs on the wall of an East Baton Rouge Parish courtroom. See The Week In Review, Baton Rouge Advoc., Aug. 31, 2003, at 4B, *available at* 2003 WL.

Maine: There is a mural depicting Moses carrying stone tablets in the state courthouse in Rumford, Maine.

Maryland: There is a monument on the courthouse lawn in Cumberland, Maryland. See http://www.inthefaith.com/archive/001451.php; http://www.showmenews.com/2004/Oct/20041023Feat004.asp. There is also a monument in a park in Frederick. See http://www.demossnewspond.com/aclj/releases/2004%20Releases/10 command011604.htm.

Massachusetts: There is a depiction of the Ten Commandments in the central panel of a frieze on the north wall in the Boston Public Library. See http://www.sargentmurals.bpl.org/site/murals/24_description. html.

Minnesota: There is a bronze plaque bearing the Ten Commandments on the entrance to the Crow Wing County Courthouse in Brainerd. See http://www.mfc.org/contents/article.asp?id=1123.

Mississippi: There is a statue of Moses holding the Ten Commandments atop the Hinds County Courthouse. See http://home.millsaps.edu/~beckea/Buildings2.html.

Missouri: There is monument of the Ten Commandments on the grounds of the State Capitol in Jefferson City. See http://atheism.about.com/b/a/021266.htm.

Montana: There is a granite monolith bearing the Ten Commandments on the capitol grounds in Helena. See http://www.helenair.com/articles/2004/09/22/montana/a01092204_04.txt.

Nebraska: There is a depiction of the Ten Commandments on a light fixture in the chamber of the State Supreme Court. See http://court.nol.org/tour/tour.htm. On the outside of the State Capitol in Lincoln is a relief showing Moses carrying the Ten Commandments. See http://www.wilhelm-aerospace.org/Architecture/modern/art-deco/nebraska-capitol/ten-commandments.JPG. Fremont has a monument of the Ten Commandments in a public park. See www.journalstar.com/articles/2004/02/19/local/10045545.txt.

Nevada: There is a stone sculpture bearing the Ten Commandments in the Lovelock Courthouse. There is also a display at a senior center owned by the City of Las Vegas.

New Hampshire: A Ten Commandments monument donated by the Fraternal Order of Eagles sits on City-owned land near Somersworth City Hall. See *Religious Monument on City Land Questioned*, Jan. 5, 2005, *available at* http://www.portsmouthhearld.com/news/01052005/news/57349.htm.

New Jersey: There is a Ten Commandments monument in a public park in Trenton.

New Mexico: A monument of the Ten Commandments sits on the lawn in front of the Curry County courthouse in Clovis, New Mexico. See *Curry Courthouse Displays Commandments Monument*, Aug. 29, 2003, *available at* http://amarillo.com/stories/082903/usn_currycourthouse.shtml; Sanford Brickner, *Know Your Rights: Court Case Spotlights Religious Liberty*, Santa Fe New Mexican, Sept. 5, 2003, at C3, *available at* 2003 WL 57253786.

New York: A state courthouse in Brooklyn has a carved medallion on the facade depicting Moses carrying the Commandments. See http://www.courts.state.ny.us/history/elecbook/2ddept/pg13.htm.

North Carolina: The back wall of the main courtroom in the Haywood County Courthouse has a sculpture of the Ten Commandments. See *Suhre* v. *Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999).

North Dakota: There is a monument bearing the Ten Commandments in a public plaza in Fargo. See http://news.minnesota.publicradio.org/features/2004/10/12_ap_tencommandments. A monument of the Ten Commandments sits outside the Morton County Courthouse in Manden, North Dakota. See http://www.kqcd.com/showNews.asp?whatStory=2137.

Ohio: There is a monument of the Ten Commandments outside the Lucas County courthouse in Toledo. See http://www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID=16102&c=38.

Oklahoma: There is a monument of the Ten Commandments on the lawn of the Haskell County courthouse. See http://www.amarillo.com/stories/111004/usnten.shtml.

Pennsylvania: The Ten Commandments appears in a mural in the Pennsylvania Supreme Court courtroom in Harrisburg. See Jonathan Gelb, *Commandment Fight Expands to Chester County's Web Site*, Phila. Inquirer, Feb. 26, 2003, at B7; see also http://www.slate.com/id/2075609/slideshow/2075609/fs/0//entry/2075617/. Both the Allegheny County Courthouse and the Chester County courthouse have plaques of the Ten Commandments on their facades. See *Modrovich* v. *Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004); *Freethought Soc'y of Greater Philadelphia* v. *Chester County*, 334 F.3d 247 (3d Cir. 2003); see also http://www.post-gazette.com/localnews/ 20030627plaquereg4p4.asp.

Tennessee: A plaque bearing the Ten Commandments hangs on the outside of the Washington County court

house. See Melanie B. Smith, *A Busy Time for the Big 10: Ten Commandments Courthouse Controversy Not Solely in Alabama*, The Decatur Daily, Aug. 30, 2003, *available at* http://www.decaturdaily.com/decaturdaily/religion/030830/ten.shtml. There is also a plaque containing the Ten Commandments in the foyer of the Sullivan County Courthouse, *ibid.*, and there is a framed copy of the Ten Commandments in the foyer of the Monroe County Courthouse, *ibid.* We have been advised that courthouses in approximately 45 of the 95 counties in Tennessee have similar displays.

Texas: Display at issue in this case.

Utah: There is a monument of the Ten Commandments in a public park in Pleasant Grove. See http://www.thomasmore.org/news.html?NewsID=214.

Washington: A monument of the Ten Commandments sits on the lawn in front of the police department in Everett, Washington. See BC-Washington Digest, Can. Press, July 24, 2003, *available at* 2003 WL 60142300; see also *Ten Commandments: North News*, Seattle Post-Intelligencer, June 2, 2001, at B1, *available at* 2001 WL 3560440.

West Virginia: A plaque of the Ten Commandments hangs on a wall in one of the courtrooms in the Clay County Courthouse. See http://www.afa.net/clp/ReleaseDetail.asp?id=75.

Wisconsin: The City of La Crosse had a monument of the Ten Commandments in Cameron Park. A federal judge ordered the monument removed. The City then sold the monument and the land around it to the Fraternal Order of Eagles. That sale was recently upheld by the Seventh Circuit. See *Mercier* v. *Fraternal Order of Eagles*, No. 04-1321, 2005 WL 81886 (7th Cir. Jan. 3, 2005).

Wyoming: Cheyenne has a monument of the Ten Commandments in a public park. See www.billingsgazette.com/index.php?id=1&display=rednews/2003/11/25/build/wyoming/42-cheyennetencommandments.inc.

Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

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No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

vs.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board; DAVID DEWHURST, in his official capacity as Co-Vice Chairman, State Preservation Board and President of the Senate of Texas; TOM CRADDICK, in his official capacity as Co-Vice Chairman, State Preservation Board and Speaker of the House of Representatives of Texas; CHRIS HARRIS, in his official capacity as Member of the State Preservation Board; PEGGY HAMRICK, in her official capacity as Member of the State Preservation Board; JOCELYN LEVI STRAUSS, in her official capacity as Member of the State Preservation Board; CHARLYNN DOERING, in her official capacity as Interim Executive Director, State Preservation Board,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MERITS BRIEF *AMICUS CURIAE* OF AMERICAN ATHEISTS IN SUPPORT OF THE PETITONER

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INTEREST OF AMICUS CURIAE[1]

American Atheists is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair,[2] for over thirty years American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause.[3] American Atheists' perspective is rooted in the philosophy of materialism, "which holds that nothing exists but natural phenomenon."[4]

> The indestructible foundation of the whole edifice of Atheism is its philosophy, materialism, or naturalism, as it is also known. That philosophy regards the world as it actually is, views it in the light of the data

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent of the Petitioner are on file with the Clerk of the Court. A copy of the letter of consent of the Petitioner and Respondent included in the Appendix. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Ms. O'Hair founded American Atheists following the United States Supreme Court ruling in School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals' approval of public school bible readings in her case, Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962).

[3] Ms. O'Hair and American Atheists' work includes the founding of the first known Atheist library and archives in the United States, production of American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by Atheists, founding of the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series, and countless other cultural and legal contributions to the Atheist cause.

[4] Madalyn Murray O'Hair, Atheism, American Atheists, at http://www.atheists.org/Atheism/atheism.html (last visited December 9, 2004).

provided by progressive science and social experience. Atheistic materialism is the logical outcome of scientific knowledge gained over the centuries.[5]

No gods, spirits, fairies, or other imagined entities pull at the strings of humanity. The materialist philosophy of Atheism promotes a positive viewpoint and provides the impetus to effect change.

> Materialism liberates us, teaches us not to hope for happiness beyond the grave but to prize life on earth and strive always to improve it. Materialism restores to man his dignity and his intellectual integrity. Man is not a worm condemned to crawl in the dust, but a human being capable of mastering the forces of nature and making them serve him. Materialism compels faith in the human intellect, in the power of knowledge in man's ability to fathom all the secrets of nature and to create a social system based upon reason and justice. Materialism's faith is in man and his ability to transform the world by his own efforts. It is a philosophy in every essence optimistic, life-asserting, and radiant. It considers the struggle for progress as a moral obligation, and impossible without noble ideals that inspire men to struggle, to perform bold, creative work.[6]

Given American Atheists' unswerving dedication to the Atheist cause for over three decades, American Atheists submits this brief in support of Petitioner and urges the Court to reverse the decision of the Fifth Circuit Court of Appeals.

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[5] Id.
[6] Id.

SUMMARY OF THE ARGUMENT

Both the Ten Commandments monument, which is prominently displayed alone on the grounds of the Texas state capitol for the purpose of commending the Eagles organization and for the purpose of signifying the role of the Ten Commandments in the enactment, administration, and construction of the laws of Texas, along with its enabling state legislation, violate the prohibition of the Establishment Clause of the First Amendment that "Congress shall make no law respecting an establishment of religion," as applied to the states through the Fourteenth Amendment. No plausible reason justifies the endorsement and promotion of the sacred text of Judaism and Christianity as a way of commending the Eagles organization other than the endorsement of religion in general or the endorsement of a particular set of religious beliefs. As a result, the monument and the legislation lack a valid secular purpose under the first Lemon prong. In addition, the prominent placement of the monument and its lack of relevance to the dedicated purpose of the National Historic Landmark, are sufficiently likely to be perceived by adherents of the Ten Commandments as an endorsement, and by nonadherents as a disapproval, of their individual religious choices. As a result, the monument and legislation violate the second prong of Lemon.

ARGUMENT

I. THE RESPONDENTS' DISPLAY OF THE TEN COMMANDMENTS MONUMENT VIOLATES THE VALID SECULAR PURPOSE REQUIREMENT OF THE ESTABLISHMENT CLAUSE REGARDLESS OF ANY ALLEGED SECULAR CONTENT OR CONTEXT.

To satisfy the first prong of Lemon, a challenged statute "must have a secular legislative purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This prong is violated if the statute is "motivated wholly by an impermissible purpose." Lynch v. Donnelly, 465 U.S. 668, 680 (1984). While courts are normally deferential to government's articulation of secular purpose, close examination is important to reveal insincere or sham purposes. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987). There is a reluctance to attribute unconstitutional motives to the states when there is "a plausible secular purpose … discernable on the face of the statute." Meuller v. Allen, 463 U.S. 388, 394-95 (1983). But where a legislature has a pre-eminent religious purpose in enacting a statute, a court need not be blind to that purpose, even where the legislature proffers a secular purpose. Edwards, 482 U.S. 578, 589-590.

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.

Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). "This intention may be evidenced by promotion of religion in general, . . . or by advancement of a particular religious belief." Edwards, 482 U.S. 578, 585; See, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 540 (1993). Thus, in addition to insincerity or sham of the stated purpose, the lack of a secular purpose may be found on the face of a statute by its (1) implausibility, (2) promotion of religion in general, or (3) advancement of a particular religious belief. In this case, the proffered secular purpose is implausible, promotes religion in general, and advances a particular religious belief.

This Court has already unequivocally determined the religious nature of the Ten Commandments. In Stone v. Graham, 449 U.S. 39 (1980), this court was faced with an "avowed" secular purpose recited in the text of the law requiring their posting on the schoolhouse wall, and in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Commandments' religious content was held to be unmistakable when this Court held that "The Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." Id., at p. 41. The Court referred to the alleged partial secular content of the Decalogue as merely "arguable":

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17;

> Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Id., at pp. 41-42 (footnote omitted). As a result, this Court in Stone rejected the avowed secular purpose as facially implausible. Id.

The Fifth Circuit opinion relies on exactly the type of reasoning that this Court firmly rejected in Stone:

> Even those who would see the Decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society.

351 F.3d 173, 182; "The plaintiff's contention here forgets that the Commandments have a secular dimension as well as a religious meaning." 351 F.3d 173, 179. The Fifth Circuit opinion fails to cite any authority for these dubious and unsupported conclusions that are contrary to the findings of this Court in Stone, and they are without support in the record below. The Fifth Circuit opinion fails to name any secular scholar or identify any opinion of this Court attesting to these propositions. Which law of Texas or elsewhere derives from the commandment "Remember the Sabbath day, to keep it holy," which presumably includes requiring slave owners to give them a day off? Which laws of Texas or elsewhere derive from the commandment that we don't have freedom to

express anti-theistic opinions or that we are to not covet our neighbor's wife? Nowhere do the Ten Commandments prohibit slavery, drunken driving, or father-daughter incest. They set no useful health standards, no monetary or judicial criteria, and no social service standards. They are useless in matters of probate, contract law, human/civil rights, and constitutional law. Of the Ten Commandments, four address themselves to how and when to worship the proper gods, and two concern women simply as pieces of property.

The court in ACLU v. McCreary County, Kentucky, 354 F.3d 438, 452 (6th Cir. 2003) found it significant that neither the defendants nor the dissent attempted to buttress the historical claim that the Ten Commandments have a foundational role in the law. It is no less significant here that the Fifth Circuit's reliance on the foundational importance of the Ten Commandments in the formation of laws has no support in the record below, in the decisions of this Court, or from a generally accepted secular historical record.

The proffered secular purpose for the installation of the Ten Commandments monument was gleaned by the district court and the Fifth Circuit opinion from the resolution granting the Eagles permission to erect the monument: "to recognize and commend a private organization for its effort to reduce juvenile delinquency." 351 F.3d 173, 178. The Fifth Circuit opinion accepted the stated secular purpose without examination because there was "nothing in either the legislative record or the events attending the monument's installation to contradict the secular reasons laid out in the legislative record." 351 F.3d 173, 179.

The Fifth Circuit's confinement of its examination to whether there is contradictory language in the legislative record itself or to events attending the installation of the monument is superficial. Upon closer examination, the

proffered secular purpose for the Ten Commandments monument fails all three of the tests of plausibility, promotion of religion in general, and advancement of a particular religious belief.

The Fifth Circuit opinion's reliance on the recited legislative purpose for the installation of the monuments is exactly the type of blind deference that this Court explicitly rejected in Stone: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." Stone, supra, at p. 41. The implausibility of the proffered secular purpose for the Texas Capitol monument is readily apparent. There is simply no rational correlation between the state's supposed appreciation for the efforts of the Eagles organization to reduce juvenile delinquency and the state's adoption and promotion of a religious text having no obvious connection to the Eagles. Would the state's sponsorship of a celebration of a Catholic Mass on the steps of the Capitol bear any rational relationship to commending the Eagles even if the legislature deemed it so? Could the installation of a loudspeaker on the Texas Capitol grounds blaring out a religious text twenty-four hours a day rationally be considered proportional or commensurate to Eagles' efforts to reduce delinquency? No rational correlation can be made between the state's promotion of a sacred religious text and commending the Eagles regarding juvenile delinquency. The absence of plausibility of the legislative recitation compels a finding of a lack of valid secular purpose for the monument. Stone, supra.

The legislative recitation also fails this court's secular purpose prohibitions against promotion of religion in general and advancement of a particular religious belief. Edwards, supra. The monument presents an apparently unique wording

of the Ten Commandments, which is similar to but allegedly not identical to the Jewish and Christian versions. Nevertheless, it cannot be denied that the monument promotes and advances a particular religious belief. Indeed, the monument contains undeniably sectarian symbols of two major religions: two small stars of David, the traditional symbol of Judaism, and a Chi/Rho, the traditional symbol of the Christ of Christianity. 351 F.3d 173, 176. These symbols are undisputedly religious and sectarian. Thus, the monument's promotion of either religion in general or the advancement of a particular religious belief compels a finding that the legislative recitation is not a valid secular purpose. As a result, the legislation and monument at it issue fail the secular purpose prong of Lemon and must be enjoined under the Establishment Clause.

The Fifth Circuit opinion attempts to bolster its casual examination of the legislative recitation by citing the 42 years that the monument has existed without legal complaint. The opinion makes the remarkable, if not astonishing, assertion that "[h]ad this monument been recently installed, the inference of religious purpose would have been stronger." One can only conclude that the Fifth Circuit opinion assumes that the Ten Commandments have only recently taken on a religious significance! Suffice it to say that the Fifth Circuit's reliance on the lack of recency of the monument, as proof of a secular legislative intent, displays a paucity of reason. As the Court said in Walz v. Tax Comm'n of New York City, 397 U.S. 664, 678 (1970): "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

The decision of the Court of Appeals must be reversed under the first Lemon prong.

II. THE TEXAS CAPITOL TEN COMMANDMENTS MONUMENT UTTERLY FAILS TO PASS CONSTITUTIONAL MUSTER AS AN ENDORSEMENT OF RELIGION CONSIDERING ITS CONTENT AND CONTEXT.

In evaluating the government's use of religious symbolism under the second Lemon prong, the Supreme Court has held that it "must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" County of Allegheny v. ACLU of Pittsburgh, 492 U.S. 573, 597 (1989).

> A public school's sponsorship of a religious message is impermissible under the establishment of religion clause of the Federal Constitution's First Amendment, because such sponsorship sends (1) the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the political community; and (2) an accompanying message to adherents that they are insiders and favored members of the political community.

Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 309-310 (2000); See also, County of Allegheny, 492 U.S. 573, 593-597 (1989) (citing Wallace v. Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment)) and Grand Rapids v. Ball, 473 U.S. 373, 389-392 (1985)). This principle is at least as applicable when the religious message is sponsored by government at a state capitol "which is so plainly under government ownership and control that every

display on its property is marked implicitly with government approval." ACLU v. McCreary County, 354 F.3d 438, 461 (6th Cir. 2003)(internal quotation marks omitted).

The analytical task under County of Allegheny, supra, is to determine whether the religious symbol "in [its] 'particular physical setting[],' has the effect of endorsing or disapproving religious beliefs." County of Allegheny, 492 U.S. 573, 597 (1989).

The Fifth Circuit opinion notes that the Ten Commandments monument is located on the 23 acre grounds of the Texas capitol on the north side of the Capitol Building on a line drawn between the Supreme Court and the Capitol Rotunda, about 75 feet from the Capitol Building, and 123 feet from the Supreme Court Building. 351 F.3d 173, 176. According to the Fifth Circuit opinion, the present location of the monument was carefully chosen to be at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building, to as to be a "link[] with those houses of the law while standing apart and not physically connected to any of them. The Decalogue is presented as relevant to these law-giving instruments of State government, but from a distance." 351 F.3d 173, 181. The National Historic Landmark that is comprised of the 23 acres is dedicated by Texas statute to the display of "statutes, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today." 351 F.3d 173, 180.

The Fifth Circuit opinion's conclusion that "a reasonable viewer would not see this display as either a State endorsement of the Commandment's religious message or as excluding those who would not subscribe to its religious

statements," is unsupported by any aspect of the monument's purpose, placement, or context.

The Fifth Circuit's almost exclusive reliance on the placement of the monument between the three main "law-giving instruments of State Government," for its finding of no endorsement is unavailing. 351 F.3d 173, 181. Instead of supporting the conclusion that a reasonable observer would not perceive the monument to be an endorsement or disapproval of religious beliefs, quite to the contrary, the Fifth Circuit opinion makes it plain that the state intended to and does convey the impression that this Judeo/Christian religious text is relied upon in the enactment, administration, and interpretation of the laws of Texas by its location between these "law-giving" buildings. Id. As pointed out above, there is nothing in the record that suggests that the Ten Commandments are related to the enactment of the laws of Texas or anywhere else. The suggestion by the state, by the placement of the monument, that its laws are based on or related to the Ten Commandments, is an endorsement of their adherents' religious beliefs, and disapproval of the beliefs of nonadherents, which violates the standards that this Court has applied to government placement of religious symbols under the second Lemon prong.

In Stone, supra, this Court relied upon the lack of the Ten Commandments' integration into the school curriculum in an otherwise secular context for the appropriate secular study of history, civilization, ethics, comparative religion, or the like. Id., at 42. It held that the posting of the texts on the wall "serves no such educational function." Id. Here, although the Fifth Circuit opinion alludes at the outset to the National Historic Landmark's dedication to the display of statutes, memorials, and commemorations of people, ideals and events" composing Texan identity, the opinion makes no

attempt to explain how the Ten Commandments are related to the purpose of the National Historic Landmark. 351 F.3d 173, 175-176. Indeed, there is nothing obvious in the text of the Ten Commandments that in any way suggests a relation to the people, ideals and events of Texan identity, and the Fifth Circuit opinion doesn't suggest that it does. Just as this Court held in Stone that posting the text on the school house wall served no educational function, the exhibit of the Ten Commandments bears no rational relationship to the dedicated purposes of the National Historic Landmark. Therefore, it cannot be seen as other than an endorsement or disapproval of religious belief that is obvious from the face of the text.

The Fifth Circuit opinion additionally makes an allusion to tours of the Capitol Building provided by the Visitor Services of the State, and publishes a written guide for walking tours of the grounds for visitors, as if these factors were relevant to the reasonable observer inquiry. 351 F.3d 173, 175-176. Nothing is suggested in the Fifth Circuit opinion, however, that these tours or written guide include the Ten Commandments monument at issue, or even how a reasonable observer should obtain such a tour or written guide. In addition, the Fifth Circuit opinion attempts to blur the distinction between public property forum neutrality principles, as found in such cases as Capitol Square Review and Advisory Bd. v. Pinnette, 515 U.S. 753, 779-780 (1995), and Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001), and the government's display of religious messages principles. 351 F.3d 173, 177-178. This Court has not adopted the reasonable observer standard of Justice O'Connor's concurrence in Capitol Square for government religious displays. Cf., 515 U.S. 753, 779-780 (O'Connor, J., concurring in part and concurring in judgment) and 515 U.S.

753, 797-807 (Brennan, J., dissenting). Indeed, Justice O'Connor's reasonable observer appears to present an unworkable standard. How much research must the reasonable observer undertake to discover the legislative history of the Ten Commandment's monument legislation, its dedication ceremony, and the rationale for its placement location? How practical is it to require that she have taken a tour of the Capitol Building, or obtained the proper brochure of the National Historic Landmark layout, which may or may not disclose the existence of the Ten Commandments monument, as the Fifth Circuit opinion suggests? 351 F.3d 173, 175-176. The failure of the reasonable observer to have fully acquainted herself with the legislative and other history of a government religious display does nothing to diminish the "perce[ption] by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." County of Allegheny, 492 U.S. 573, 597.

There is nothing in the text of the Ten Commandments monument itself that discloses a secular legislative intent, or connects it to other monuments scattered about the 23 acre landmark site. From the lack of connection to the other statues and monuments on the capitol grounds, the reasonable observer could just as easily conclude that the Ten Commandments was not a part of the display of "significant events and strands of Texas history." 351 F.3d 173, 177. In County of Allegheny, this Court held that the crèche standing alone in a prominent area of the courthouse violated the Establishment Clause despite "[t]he presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum." 492 U.S. 573, 599, n. 48. As in County of Allegheny, the Ten Commandments monument stands alone in its physical setting

in a prominent location between the houses of government, so that "no viewer could reasonably think that it occupies this location without the support and approval of the government." 492 U.S. 573, 599-600.

The decision of the Court of Appeals must be reversed under the second Lemon prong.

CONCLUSION

The Ten Commandments monument, displayed alone by state government in a prominent position on the Texas state capitol grounds midway between the three "law-giving" buildings with the intent of showing the prominent effect of this religious text in the enactment, administration, and construction of Texas laws, together with its enabling legislation, violates the purpose prong of Lemon. In addition, the monument is lacking in any secular context that would cause a reasonable observer to perceive anything but the government's endorsement or disapproval of religious beliefs. Amicus respectfully requests that the Court of Appeals for the Fifth Circuit be reversed.

Dated: December 13, 2004

Respectfully submitted,

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November 30, 2004

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Dear Mr. Bruno,

I hve filed with the Supreme Court a blanket consent to all amicus briefs, on both sides, in *Van Orden v. Perry*. Please let me know if I can be of any further assistance.

Sincerely,

s/_____
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November 29, 2004

VIA U.S. MAIL

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Re: *Thomas Van Orden v. Rick Perry, et al.*, No. 03-1500

Dear Mr. Bruno:

The Respondent Texas consents to your filing of an amicus brief in this matter.

Sincerely,

s/_____
Amy Warr

AW/sl

JAN 31 2005
OFFICE OF THE CLERK

No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTEREST OF *AMICUS CURIAE*

Amicus, American Center for Law and Justice (ACLJ), is a nonprofit, public interest law firm and educational organization specializing in First Amendment litigation. ACLJ attorneys have argued or participated as amicus curiae in numerous cases in this Court. *See, e.g.*, *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Westside Comm. Sch. V. Mergens*, 496 U.S. 226 (1990).

Amicus has represented nearly two dozen governmental entities in cases involving the defense of public displays of the Ten Commandments and other objects with religious significance, including the following reported cases: *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C. J., with whom Scalia and Thomas, J. J., join, dissenting from denial of cert.) (Fraternal Order of Eagles Ten Commandments Monument in front of city hall); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F. 3d 484 (6th Cir. 2004) (Ten Commandments poster in courtroom display); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F. 3d 1020, *rehearing granted*, 2004 U.S. App. LEXIS 6636 (8th Cir. Neb., Apr. 6, 2004) (Fraternal Order of Eagles monument in city park); *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F. 3d 487 (7th Cir. 2000) (statue of Jesus Christ in city park); *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E. D. Ky. 2003) (Decalogue included in Foundations of American Law and Government courthouse display); *Schmidt v. Cline*, 127 F. Supp. 2d 1169 (D. Kan. 2000) (In God We Trust poster in county treasurer's office). The ACLJ

has developed a special expertise in this area which would be of benefit to the Court.

SUMMARY OF ARGUMENT

The Fifth Circuit's observation that the Decalogue has had an "extraordinary influence" on the civil and criminal laws of this country is a bit of an understatement. *Van Orden v. Perry*, 351 F. 3d 173, 181 (5th Cir. 2003). In fact, the integral part played by the Decalogue in the legal history of Western Civilization, from the dim mists of Alfred's time, through the era of Blackstone and the American framers, is made manifest in a multitude of executive and judicial references to the Ten Commandments as a source and symbol of Law, routine popular invocation of them as a paradigm of Rules, and frequent governmental depiction of them in public places, especially places where laws are made and justice administered. All of these things dramatically underscore the correctness of the court below's conclusion that "a State's display of the decalogue is a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of our reasonable observer." *Van Orden*, 351 F. 3d at 182.

By including a monument containing a non-sectarian version[1] of the Decalogue among numerous other historical

[1] The argument made by the petitioners and some amici about the supposedly "Protestant version" displayed on the monument is a red herring. The version in question is one developed by the Fraternal Order of Eagles — not a religious group at all. *See, State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P. 2d 1013, 1016-1018 (Colo. 1995). Moreover, there is no such thing as a "Protestant version" or a "Catholic version" of the Decalogue. The so-called "Catholic version" is traditionally followed by Lutherans (who certainly consider themselves Protestants). The so-called "Protestant version" is followed by the Orthodox Churches (who certainly do *not* consider themselves Protestants). *See* Harold J. Berman, *The Transformation of Western Legal Philosophy in Lutheran German Philosophy in Lutheran Germany*, 62 S. Cal. L. Rev. 1573, 1660, n. 114 (1989); *see also*, § 2066, *Catechism of the Catholic Church*, 1994.

monuments and displays on the grounds of its State Capitol, Texas does not violate the Establishment Clause. This Court should affirm the judgment of the court below.

ARGUMENT

THE HISTORY AND UBIQUITY OF GOVERNMENTAL AND OTHER RECOGNITION OF THE DECALOGUE'S SECULAR ROLE ENSURES THAT PUBLIC DISPLAYS OF THE TEN COMMANDMENTS CONVEY A MESSAGE WHICH IS PREDOMINANTLY SECULAR.

As the court below succinctly put it: "History matters here." 351 F. 3d at 181. Indeed, this Court has held that the "history and ubiquity" of a practice is one of the elements of the endorsement test. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) ("because of their history and ubiquity, those practices [Thanksgiving, In God We Trust] are not understood as conveying government approval of particular religious beliefs"); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) ("the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion"); *Capitol Square Review and Adv. Bd. v. Pinette*,

515 U.S. 753, 780 (1995) (O'Connor, J., concurring); *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (O'Connor, J., concurring) ("in examining whether a given practice constitutes an instance of ceremonial deism, its 'history and ubiquity' will be of great importance").

This case cannot be properly evaluated without an understanding of the "history and ubiquity" of the Decalogue as both a source and symbol of law in American culture. In fact, an understanding of the Commandments' role in the development of Western law, and a survey of judicial, executive, legislative and other secular references to and depictions of the Ten Commandments demonstrates that symbolic use of the Decalogue — such as that exemplified by Texas' display of the Eagles' monument — is at least as ubiquitous and as much a part of "our Nation's cultural landscape," *Newdow*, 124 S. Ct. at 2322, as other traditional practices expressly or implicitly approved by this Court. *See, e.g., Lynch*, 465 U.S. at 674-678 (listing practices which do not violate the Establishment Clause such as Thanksgiving and Christmas national holidays, paid military chaplains, legislative invocations, "In God We Trust" as national motto, "One Nation Under God" in Pledge of Allegiance, executive proclamations of days of prayer and thanksgiving, display of religious art in public museums, provision of chapels in U.S. Capitol for worship and meditation, and this Court's permanent display of Moses with the Ten Commandments).

A. *The Foundational Role of the Decalogue in the Development of Anglo-American Law*

The portion of the Hebrew Scriptures called the Ten Commandments, or the Decalogue, is an integral part of the legal heritage of Western civilization. To require its removal from the walls of American courthouses and other public

settings because it refers to the God of Israel as a source of fundamental legal obligations would be similar to requiring the removal of the Declaration of Independence because it refers to "Nature's God" and to "the Creator" and to "divine providence" as the source of the equality of all persons and of the universal rights of life, liberty and the pursuit of happiness. Indeed, if one were to eliminate religious references from our legal history, one would reduce the time-frame of that history to very recent generations.

The founders of the American Republic, in carrying over to it many features of the English law inherited from the colonial period, were highly conscious of the historical sources of that law, including its source in Biblical law and morals.

The founding fathers were entirely familiar with, and strongly influenced by, the great treatise of William Blackstone entitled *Commentaries on the Laws of England*, published in 1765, in which he wrote that there are two main sources of human law, namely, a law of nature, which "God has enabled human reason to discover," and a divine law, "whose doctrines are to be found only in holy scripture." "Upon these two foundations," Blackstone wrote, "depend all human laws; that is to say, no human laws should be suffered to contradict these."[2] Referring indirectly to the Ten

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[2] William Blackstone, *Commentaries on the Laws of England*, 39-42 (facs. editions, 1979) (1765). The founding generation learned its law from Blackstone's *Commentaries on the Laws of England*. See, Albert Altschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1 (1996). As historian Daniel Boorstin puts it, "In the history of American institutions, no other book — except the Bible — has played so great a role . . ." Daniel J. Boorstin, *The Mysterious Science of the Law* (1958).

Commandments, Blackstone stated that "murder . . . is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime."[3] Indeed, the first major book of English history, King Alfred's 9th century collection of rules of Anglo-Saxon law, starts with the full text of Exodus 20:1-17 of the Old Testament, containing the Ten Commandments.[4]

The Biblical commandments were also considered to be authoritative in English law throughout the Roman Catholic period of its history (12th to early 16th centuries) as well as throughout the Tudor-Stuart period of royal supremacy over the Church of England (16th to 17th centuries). Sir John Fortescue's 15th century political and legal treatise, *In Praise of the Laws of England*, which was republished and annotated by John Selden in the 17th century, invoked Mosaic law in

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[3] *Id.*, p. 42.

[4] *See*, J.A. Giles, *The Whole Works of King Alfred the Great*, vol. 3 (ed., 1858) p. 120. The precarious nature of Alfred's achievement — building a society based on law in the face of barbarian violence and chaos — an achievement too little appreciated in our time, is perhaps best captured in Chesterton's lines:

> A sea-folk blinder than the sea
> Broke all about his land,
> But Alfred up against them bare
> And gripped the ground and grasped the air,
> Staggered, and strove to stand.
> * * *
> And for one hour of panting peace,
> Ringed with a roar that would not cease,
> With golden crown and girded fleece
> Made laws under a tree.

G. K. Chesterton, *The Ballad of the White Horse*, Book I.

order to inspire the "Prince" to govern according to the rule of law.[5] Likewise, Sir Edward Coke considered natural law, "which predated and underlay the laws of England," to have "had its earliest written expression in Mosaic law."[6] William Welwood's 1636 commentary on maritime law twice cited precedents from Deuteronomy as authoritative, in the division of spoils and on letters of marque respectively.[7]

Under the influence of Calvinism in the later 17th and early 18th centuries an even stronger emphasis was placed on Mosaic law, including the Decalogue, and on the Biblical sources of English law.

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[5] Fortescue's treatise is presented as a dialogue between a "Prince" and a "Chancellor" who advises the Prince on English law and good governance." "Moses, that greatest of legislators," Fortescue's Chancellor advises the Prince ". . . invites you to strive zealously in the study of the law." Furthermore, Fortescue urges the Prince to study the Mosaic law of Deuteronomy "all the days of his life." Sir John Fortescue, *De Laudibus Legum Anglie*, published in Sir John Fortescue, *On the Laws and Governance of England*, Shelly Lockwood, ed., in *Cambridge Texts in the History of Political Thought* (1997) p. 4.

[6] *See* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Religion 525 (1999) p. 534. Green denies that the Ten Commandments formed a significant part of 18th century legal theory, although he acknowledges that prior to the 18th century the Ten Commandments in general, and Mosaic law in particular, were often cited as part of the English legal tradition and constituted the moral foundation of common law, including the charters and laws of the American colonies.

[7] William Welwood, *An Abridgement of All Sea-Laws Gathered Forth of all Writings and Monuments, Which Are to be Found Among Any People or Nation* (1636) pp. 179, 182.

Although Calvinism remained especially strong in the American colonies, it eventually had to compete with other forms of Protestantism and also with Deism. All these belief-systems shared, however, a strong belief both in the religious foundation of moral values and in the moral foundations of legal principles. As President George Washington stated in his Farewell Address of 1796, "[R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles." "Let it simply be asked," he said, "where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of law?"

Unlike the contemporary French Revolution of 1789, which initially abolished the Biblical seven-day week in favor of a ten-day week, and unlike the Russian Revolution of October 1917, which initially abolished the Biblical seven-day week in favor of a numbered five-day work week with the sixth day off, the American Revolution preserved the Biblical seven-day week, dictated by the Ten Commandments, with a seventh day of rest.

The Ten Commandments has also played a decisive role in Western legal scholarship. Protestant legal scholars of the 16th century, starting with Martin Luther and Philip Melanchthon, faced with the task of synthesizing for Protestant princes the pre-existing separate systems of canon law, Roman law, royal law, feudal law, and mercantile law, turned to the last six of the Commandments to identify "branches" or "fields" of law. They found the source of constitutional law expressed in the commandment to honor one's father and mother, which they interpreted as a command to respect higher authority; the source of criminal law in the commandment not to kill; the source of family law in the commandment not to commit adultery; the source of property

law in the commandment not to steal; the source of contract law in the commandment not to bear false witness; and the source of the law of delict in the commandment not to covet, that is, not to seek to obtain what belongs to another. These categories which are still preserved in our legal science, cut across the diverse jurisdictions of the earlier period, each of which had been autonomous but which, with the rise of Protestantism, came to be combined under the authority of the monarch. Of particular importance legally was the separation, for the first time, of the category of property from the Roman law category of obligations.[8]

It is hardly an establishment of religion officially to recognize that the Ten Commandments were understood by our ancestors to be the source of the division of law into branches of constitutional law, criminal law, family law, property law, contract law, and tort law.

Not only the authors of the United States Constitution but also their successors who are authorized to interpret it have preserved the historical dimension of American law. The continuity of its development over generations and centuries, which is reflected in the doctrine of precedent as well as in legal scholarship, is symbolized in the display of the Ten Commandments, which for centuries has been considered to be a historical source of universal legal obligations.

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[8] *See* Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003) p. 82-85, 117-118.

B. *Evidence of Judicial Recognition of Decalogue's Foundational Role.*

1. The U.S. Supreme Court

On at least seven occasions, members of this Court have noted the foundational role of the Ten Commandments in the development of our legal system.[9] See, *McGowan v. Maryland*, 366 U.S. 420 (1961) (Frankfurter, J.,) ("Innumerable civil regulations enforce conduct which harmonizes with religious concerns. State prohibitions of murder, theft and adultery reinforce commands of the decalogue"); *Griswold v. Connecticut*, 381 U.S. 479, 529, n.2 (1965) (Stewart, J., dissenting) (most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J. dissenting) (the Ten Commandments, undeniably, "have had a significant impact on the development of secular legal codes of the Western World"); *Lynch*, 465 U.S. at 677 (Burger, C.J.) (noting with approval the presence of depiction of Moses and Ten Commandments on Supreme Court's wall); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (Brennan, J.) (Ten Commandments have played both a secular and religious role in the history of Western Civilization); *County of Allegheny,* 492 U.S. at 652-53 (Stevens, J., with whom Brennan, J., and Marshall, J., join concurring in part, dissenting in part) (carving of Moses with Ten Commandments on wall of Supreme Court's courtroom alongside famous secular lawgivers is a fitting message for a courtroom); *City of Elkhart v. Books*, 532 U.S.

[9] The late Chief Justice Warren attributed such a role to the Bible in general: "I believe the entire Bill of Rights came into being because of the knowledge our forefathers had of the Bible and their belief in it . . . ," quoted in TIME, Feb. 15, 1954.

1058 (2001) (Rehnquist, C. J., with whom Scalia, J. and Thomas, J., join, dissenting from denial of certiorari) ("Undeniably, however, the Commandments have secular significance as well, because they have made a substantial contribution to our secular legal codes").

2. The State Supreme Courts

There are well over a hundred references to the Ten Commandments in the reported decisions of the state supreme courts. Appendix A lists the relevant citations. Each case contains some statement acknowledging the foundational role of the Decalogue in Anglo-American jurisprudence or a reference to the Commandments as an archetype of Law in general. The following examples are illustrative of the tenor of this recurrent theme of American jurisprudence:

- *Bertera's Hopewell Foodland, Inc. v. Masters,* 236 A.2d 197, 200-201 (Pa. 1967) ("This Act of 1794 (Pennsylvania Sunday Closing Law) itself traces an ancestry back to the Ten Commandments fulminated from the smoking top of Mt. Sinai. This divine pronouncement became part of the Common Law inherited by the Thirteen American colonies and by the sovereign States of the American union.")

- *Moore v. Strickling,* 33 S.E. 274, 277 (W.Va. 1899) ("[I]t is said that the illustrious King Alfred adopted the Ten Commandments as the foundation of the early laws of England, contained in his Doom Book. These commandments * * * appeal to us as coming from a superhuman or divine source, and no conscientious or reasonable man has yet been able to find a flaw in them. Absolutely flawless, negative in terms, but positive in meaning, they easily stand at the head of our whole moral system, and no nation or people can long continue a happy existence in open violation of them.")

• *State v. Gamble Skogmo, Inc.,* 144 N.W.2d 749, 768 (N.D. 1966) ("Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.")

• *Commissioners of Johnson County v. Lacy,* 93 S.E. 482, 487 (N.C. 1917) ("[O]ur laws are founded upon the Decalogue; not that every case can be exactly decided according to what is there enjoined, but we can never safely depart from this short but great declaration of moral principles without founding the law upon the sand, instead of upon the eternal rock of justice and equity.")

• *O'Rourk v. State,* 53 N.W. 591, 592 (Neb. 1892) ("Free discussion, however, is the outgrowth of free government. All free government is based on the divine law. God gave the ten commandments to Moses, which contain rules designed to apply to the whole race. Although given to the Israelites, they were designed for all humanity.").

• *Anderson v. Maddox,* 65 So.2d 299, 301-302 (Fla. 1953) ("'Thou shalt not steal' and 'thou shalt not bear false witness' are just as new as they were when Moses brought them down from the Mountain.")

Without listing or citing the scores of references to the Decalogue in the decisions of the lower federal and state courts, the foregoing sampling must suffice to demonstrate the point; namely, the judicial branch of our government has historically, unhesitatingly made the connection between the Ten Commandments and our legal system — the same

connection made by the reasonable observer when viewing the monuments displayed at the Texas State Capitol.

C. Recognition by the Executive Branch

Presidential recognition of the Ten Commandments' role in our legal system and culture has not been wanting. Besides frequent references to the general concept of civic order being based on divine law[10] several U.S. Presidents have made specific reference to the foundational role of the Decalogue; for example, President John Adams wrote:

[10] For example:

". . . the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained. . ." *Washington's First Inaugural, 1789.*

"enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence . . ." *Jefferson's First Inaugural, 1801.*

"If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove . . . shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him?" *Lincoln's Second Inaugural, 1865.*

"And yet the same revolutionary beliefs for which our forbears fought are still at issue around the globe — the belief that the rights of man come not from the generosity of the state, but from the hand of God." *Kennedy's Inaugural, 1961.*

> If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free.

John Adams, *4 The Works of John Adams, Second President of the United States 9*, (Francis Adams, ed. 1851);

The Nation's Sixth President wrote:

> The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained . . . laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws .

John Quincy Adams, *Letters of John Quincy Adams to His Son* (Auburn: James M. Alden, 1850) pp. 61, 70-71.

Theodore Roosevelt, recounting his crusade against government corruption wrought by public officials operating without moral compasses, wrote:

> Some years ago another public man enunciated much the same doctrine in the phrase, "The Decalogue and the Golden Rule have no part in political life." Such statements, openly made, imply a belief that the public conscience is dull; and where the men who make them continue to be political leaders, the public has itself to thank for all shortcomings in public life.

Theodore Roosevelt, *The Strenuous Life*, 1900.

To Woodrow Wilson is attributed the following:

> If we had the eyes to see the subtle elements of thought which constitute the gross substance of our present habit, both as regards the sphere of private life and as regards the action of the State, we would easily discover how very much we owe to the Jews for the Ten Commandments and other contributions to Western Law.

Quoted in *Equity Inv. v. Paris*, 437 N.Y.S. 2d 1000, 1001 (N. Y. Civ. Ct. 1981).

And, in his characteristically terse fashion, Harry S. Truman said:

> The fundamental basis of this nation's laws was given to Moses on the Mount.

Harry S. Truman, *Public Messages, Speeches and Statements by the President, Jan. 1 to Dec. 31, 1950* (Washington, D.C., U.S. Government Printing Office, 1965) Item 37, p. 157.

D. *Legislative Recognition*

Because, as Justice Frankfurter observed, "innumerable civil regulations . . . reinforce commands of the decalogue," *McGowan v. Maryland*, 366 U.S. 420 (1961), it should come as no surprise to find that, historically, the foundational role of the Commandments has found expression in legislation. It is no exaggeration to say that the Ten Commandments, *literally*, have been part of our legal system for over a millennium.

As previously noted, Sir William Blackstone identified King Alfred as the founder of the English common law. *Blackstone's Commentaries*, Book I, Sec. 2.[11] The Laws of King Alfred — the very first written compilation of our laws — start with the Ten Commandments.[12]

The ubiquity of the Ten Commandments in our history also manifests itself in the legal codes of the thirteen original colonies. It may fairly be said that all of the colonies incorporated the Decalogue — in whole or in part — in their legal codes. *See,* examples reprinted in Donald S. Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History*, Liberty Fund, Indianapolis 1998. After independence, the Commandments continued to exert an obvious and strong influence on legislation, even legislation drafted by ardently anti-Establishment lawmakers such as Jefferson and Madison. It was Jefferson, after all, who (along with Madison,) when revising Virginia's code in 1785, included "Bill Number 84: Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," *see* Daniel L. Dreisbach, "Religion and Legal Reforms in Revolutionary Virginia," in *Religion and Political Culture in Jefferson's Virginia*, Sheldon, G. W., and Dreisbach, D. L., eds., Rowman and Littlefield Publishers, Inc., Lanham, Md., 2000.[13]

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[11] *See* note 2, *supra.*

[12] *See* note 4, *supra.*

[13] For Jefferson, recourse on important official occasions to the imagery of Moses and the Israelites was apparently second nature. His original design for the Great Seal of the United States was of Moses leading the people of Israel through the Red Sea while Pharaoh and his army drowned, with the following motto: "Rebellion to Tyrants is Obedience to God." Hutson, James H., *Religion and the Founding of the American Republic*, 1998, Library of Congress, Washington, D.C., pp. 50-51. His Second Inaugural

Aside from the broad and undeniable influence of the Mosaic law on our legal system in general,[14] it is clear that specific provisions of the Ten Commandments continue to directly influence and, indeed, be incorporated into our legal codes as even a cursory look at our criminal codes will attest.

Even the oft-repeated truism that the first three or four of the Commandments are "exclusively religious" turns out not to be true. *See Stone v. Graham*, 449 U.S. at 41-2 (1980). The *Stone* Court majority's characterization of the "first part of the Commandments" as "exclusively religious" cannot withstand examination.[15] The Sabbath observance

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also evokes Exodus:

> I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities of life . . .

A Compilation of the Messages and Papers of the Presidents, 1789-1897, 10 vols. (Washington, D.C., U.S. Government Printing Office).

[14] *See, e.g.*, Russell Kirk, *The Roots of American Order*, Regnery Gateway, 1991, 11-49; *and* Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding*, Encounter Books, 2001.

[15] While the routine application of *Stone* by lower courts in Ten Commandments cases is understandable at first glance, it is clear that the lower courts have placed far too much weight on what is, by this Court's definition, a weak precedent. *Stone* was a 5-4 *per curiam* decision rendered without briefing or oral argument. This Court has said that it is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Hahn v. United States*, 524 U.S. 236, 257 (1998); *also, Gray v. Mississippi*, 481 U.S. 648, 651, n.1 (1987) (citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)) ("The Court, of course, at times

Commandment was deemed to have broad secular application by the Court itself in *McGowan v. Maryland*, 366 U.S. 420 (1961). The Commandment against "using the Lord's name in vain" is applied in daily secular life, especially in law and politics, where witnesses and government officials still swear to tell the truth or uphold the law "so help me God." *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d at 507 (6th Cir. 2004) (Batchelder, J., dissenting).

The Commandment against worshipping idols, paradoxically, has had arguably the broadest secular application of all: it was referred to by the pamphleteers of the Revolutionary era as one of the reasons for overturning monarchy with its pretensions of "divine right." *Id.* Thomas Paine, free-thinking Deist though he may have been, made the connection which he knew would resonate with the readers of his best-selling *Common Sense*:

> And when a man seriously reflects on the idolatrous homage which is paid to the persons of kings, he need not wonder that the Almighty, ever jealous of his honor, should disapprove a form of government which so impiously invades the prerogative of heaven.

Thomas Paine, *Common Sense*, quoted in *The Founders' Constitution*, Vol. I, ch. 4, p. 106.

This equating of the British regime with idolatry was a common rhetorical tool used by advocates of American

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has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument").

independence in colonial times. Paine was, in fact, merely echoing sentiments widely voiced among his countrymen:

> Not only did Parliament's claims represent tyranny, they also represented idolatry. For colonists to honor these claims would be tantamount to forsaking God and abdicating their national covenant pledge to "have no other gods" before them.

Harry A. Stout, *How Preachers Incited Revolution*, Christianity Today, Spring 1996.

James Otis, in his 1764 work, *The Rights of the British Colonies Asserted and Proved*, thundered:

> It is the greatest idolatry, begotten by flattery, on the body of pride, that could induce one to think that a single mortal should be able to hold so great a power . . . The power of GOD almighty is the only power that can properly and strictly be called supreme and absolute.

The Founders' Constitution, Kurland and Lerner, eds. Vol. One, p. 52 (all caps in original.)

Thus, even the First Commandment, the one most readily dismissed in this context as having no discernible secular application, is shown to have had direct secular, political application in the creation of the American polity itself. It is beyond serious question, therefore, that the Ten Commandments — all ten of them — have exerted an enormous influence both on the general framework of our legal system as well as the specifics of our legal codes.

E. *Recognition by Depiction on Public Property*

More than once, members of this Court have pointed to the depiction of Moses and the Ten Commandments in the Court's own courtroom to illustrate acceptable accommodation by government of a religious practice or display. *Lynch,* 465 U.S. at 677; *County of Allegheny*, 492 U.S. at 652-53. In fact, the U.S. Supreme Court building has no fewer than three depictions of Moses and/or the Ten Commandments: 1) as part of the courtroom frieze, 2) dominating the East Pediment, and, 3) as part of a depiction of John Marshall on the West Pediment.[16] The East Pediment shows Moses holding the tables of the law flanked by Solon of Athens and Confucius.[17] App. B 11a-1.

The U.S. House chamber features 23 marble relief portraits of "historical figures noted for their work in establishing the principles that underlie American law."[18] According to the House Curator, the "eleven profiles in the eastern half of the chamber face left and the eleven in the western half face right, so that all look towards the full-face relief of Moses in the center of the north wall."[19] App. B 11a-2.

Courthouses and other public buildings across the nation abound with depictions of Moses and the Ten Commandments. The following is a nonexhaustive list of examples (where available, photographs of the depictions are contained in App. B):

[16] Office of the Curator, United States Supreme Court.
[17] *Id.*
[18] Office of the Curator, U.S. House of Representatives.
[19] *Id.*

- *U.S. Courthouse/Federal Building in Cleveland, Ohio*
  Main courtroom dominated by Edwin Blashfield's "The Law," the center of which depicts two angels pointing at a stone on which are inscribed the Ten Commandments. *See* "Brief Description of Mural Paintings and Statuary, Federal Building, Cleveland, Ohio." U.S. Dist. Ct. N.D. Ohio, Clerk's Office. *See* App. B 11a-3.

- *U,S. Courthouse in Indianapolis, IN*
  Ceremonial courtroom features W. B. Van Ingen's "Appeal to Justice" surmounted by two winged figures, one of whom holds the tablets of the Decalogue. Painting is located above the bench. *Traces*, Vol. 15, No. 3, Summer 2003. App. B 11a-4.

- *Pennsylvania Supreme Court in Harrisburg, PA*
  Supreme Court courtroom contains painting of "The Decalogue — Hebrew Idea of Revealed Law." App. B 11a-5.

- *Cuyahoga County Courthouse in Cleveland, OH*
  County Courthouse has eleven foot high marble statue of Moses holding the Commandments. Statue is above the courthouse's main entrance. App. B 11a-6.

- *Minnesota Supreme Court in St. Paul, MN*
  Features painting of Moses receiving the Ten Commandments on Mt. Sinai. App. B 11a-7.

- *U.S. District Courthouse in Washington, D.C.*
  Ceremonial courtroom displays statues of Moses, Hammurabi, Solon and Justinian. App. B 11a-8.

- *Chester County Courthouse, West Chester, PA* Plaque containing text of Ten Commandments affixed to outside wall of courthouse. Constitutional challenge rejected by Third Circuit in *Freethought Society v. Chester County*, 334 F. 3d 247 (3d Cir. 2003) App B 11a-9.

- *Michigan Supreme Court, Lansing, MI*
  Decalogue included in a display of Cornerstones of Law.

- *Allegheny County Courthouse, Pittsburgh, PA* Plaque containing text of Decalogue on outside of courthouse. Constitutional challenge rejected by Third Circuit in *Modrovich v. Allegheny County*, 385 F. 3d 397 (3d Cir. 2004).

- *Tennessee Supreme Court, Knoxville, TN*
  Courtroom frieze contains depiction of tablets of the Ten Commandments.

- *New York State Appellate Court, Brooklyn, NY*
  Bas-relief of Moses with Decalogue on the façade of the courthouse. App. B 11a-10.

- *Boston Public Library, Boston, MA*
  John S. Sargent mural of Moses with Commandments in Hebrew script as central panel of north wall. App. B 11a-11.

- *Ronald Reagan Building, Washington, DC*
  "Liberty of Worship" statue resting on the Ten Commandments outside Ronald Reagan Building in Washington, D.C. App. B 11a-12.

- *National Archives, Washington, D.C.*
  Ten Commandments depiction embedded in floor of National Archives Building. App. B 11a-13.

- *Library of Congress, Washington, D.C.*
  Statue of Moses holding Decalogue overlooks main reading room. App. B 11a-14.

- *Nebraska State Capitol, Lincoln, NE*
  Statue of Moses the Lawgiver on outside of state capitol building.

- *Allen County Courthouse, Fort Wayne, IN*
  Circuit Courtroom in Allen County has a mural of Moses and Justinian presenting their laws to their people.

In addition, we know from the case law that the Decalogue has been displayed for decades in courthouses and other public buildings and spaces in Elkhart, Indiana[20]; Cobb County, Georgia[21]; Haywood County, North Carolina[22]; La Crosse,

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[20] *Books v. City of Elkhart*, 235 F. 3d 292 (2000) *cert. denied*, 532 U.S. 1058 (2001).

[21] *See Harvey v. Cobb*, 811 F. Supp. 669 (N. D. Ga. 1993), *aff'd* 15 F.3d 1097 (11th Cir. 1994).

[22] *See Suhre v. Haywood Cty.*, 55 F. Supp. 2d 384 (W. D. N. C. 1999).

Wisconsin[23]; Salt Lake City, Utah[24]; Denver, Colorado[25]; and dozens of other places across the nation.[26]

The ubiquity of the Ten Commandments as a universally recognizable symbol of Law is thus seen in the incorporation of the Decalogue into the artwork and architecture of our public buildings where our laws are made, interpreted, and executed. In a far more literal sense than the legislative prayer at issue in *Marsh*, the Ten Commandments have become "part of the fabric of our society." 463 U.S. at 792.

F. *Recognition in Secular and Popular Culture*

It is also significant to note the way in which the Ten Commandments have become part of secular and popular culture and discourse. This not only distinguishes their use as a symbol from more quintessentially religious symbols such as crucifixes and crèches, but also underscores the fact that, for a reasonable observer, no message of religious disapproval or disenfranchisement automatically follows from a governmental display of the Decalogue.

The cultural ubiquity of the Decalogue is perhaps best illustrated by the frequency with which the phrase "Ten Commandments of . . ." is used in our culture — not connected with religion at all — to convey a set of important, authoritative rules or guidelines for a variety of activities. A

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[23] *Freedom From Religious Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1987).

[24] *Anderson v. Salt Lake City*, 475 F.2d 29 (10th Cir.) *cert. denied*, 414 U.S. 879 (1973).

[25] *Freedom From Religion Foundation, Inc. v. State of Colorado*, 898 P.2d 1013 (Colo. 1995) *cert. denied*, 516 U.S. 1111 (1996).

[26] *See Anderson, supra.*

survey of periodicals, articles and books from such diverse, secular disciplines as medicine, sociology, business and agriculture shows literally hundreds of titles using the phrase "Ten Commandments of . . ." in purely secular settings. (Appendix C sets forth nearly 200 such titles found in an internet search of databases in "Kentucky Virtual Public Library" on November 27, 2004).

It seems unlikely that a "reasonable observer," who embodies "a community ideal of social judgment, as well as rational judgment," *Pinette*, 515 U.S. at 781, would perceive a message of approval or disapproval of his or her religious choices when, after overindulging on Thanksgiving, he or she picks up a copy of "The Ten Commandments of buying TV fitness gadgets." App. C. The reasonable Zoroastrian otologist would probably not turn in his medical license in disgust after perusing "Ten Commandments for writing a marvelous medical paper" in his office copy of "ENT: Ear, Nose and Throat Journal." App. C. Few, if any, atheist attorneys would withdraw their appearances in cases in the Eighth Circuit Court of Appeals even after stumbling upon the reference to Judge Myron Bright's "The Ten Commandments of Oral Argument" on the Eighth Circuit's website. App. C; also at, *Practitioner's Handbook for Appeals to the Eighth Circuit*, Third Edition (2000) at 105.

The point, of course, is that references to the Decalogue in completely secular contexts are so ubiquitous in American society that the reasonable observer does not automatically think "religion" every time he or she sees a depiction of or comes across the words "The Ten Commandments." On the contrary, the ubiquity in our culture of such references makes it highly probable that a reasonable observer viewing a display like that at the Texas State Capitol in the secular historical context in which it appears would have no difficulty

ascertaining the predominantly secular message intended to be conveyed.

CONCLUSION

The widespread and longstanding recognition by government and secular society of the Decalogue's foundational role is firmly embedded in American culture and, like the traditions and practices catalogued by this Court in *Marsh* and *Lynch*, is "part of the fabric of our society." *Marsh*, 463 U.S. at 1792. Petitioners in this case would have this Court adopt a myopic view of religion and culture which this Court has repeatedly rejected. As Justice Goldberg put it:

> [n]either government nor this Court can or should ignore the significance of the fact that many of our legal, political and personal values derive historically from religious teachings.

Abington School Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., with whom Harlan, J., joins, concurring)

The Fifth Circuit's decision in this case is completely consistent with this Court's longstanding recognition of not only the historical role of religion in the formation of our secular institutions, but also the need to interpret the Establishment Clause with a "sense of proportion and fit," *Van Orden*, 351 F. 3d at 182, that prides itself on the "ability and willingness to distinguish between real threat and mere shadow." *Abington School Dist.*, 374 U.S. at 308 (Goldberg, J., with whom Harlan, J., joins concurring).

This Court should affirm the judgment of the court below.

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APPENDIX A

STATE SUPREME COURT DECISIONS WHICH REFER TO THE TEN COMMANDMENTS

Addison v. State, 116 So. 629 (Fla. 1928)

Albany Theatre, Inc. v. Short, 154 S.E. 895, 898 (Ga. 1930)

Ames, City of, v. Gerbracht, 189 N.W. 729, 733-734 (Iowa 1922)

Amick v. Montross, 220 N.W. 51, 56 (Iowa 1928)

Anderson v. Maddox, 65 So.2d 299, 301-302 (Fla. 1953)

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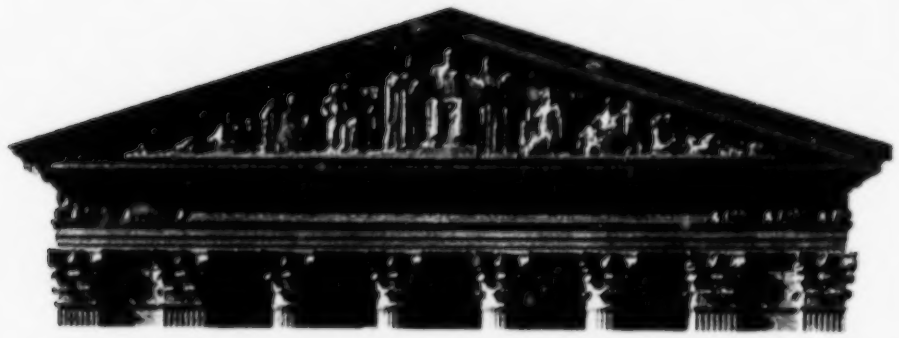
APPENDIX B

COLOR PHOTOS

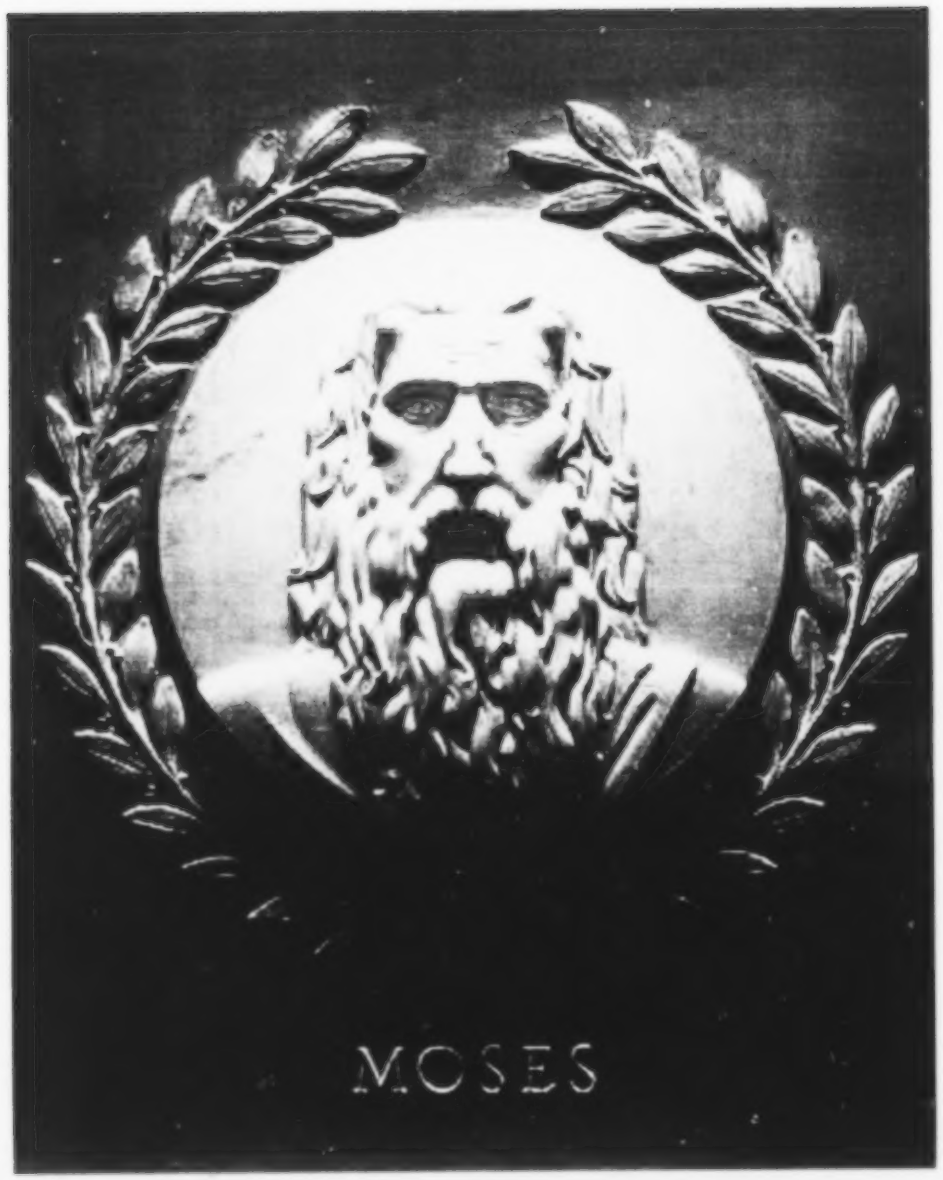
DEPICTIONS OF MOSES AND THE TEN COMMANDMENTS ON PUBLIC PROPERTY



East Pediment of U.S. Supreme Court Building

Detail

11a-2



Chamber of U.S. House of Representatives
Relief of Moses

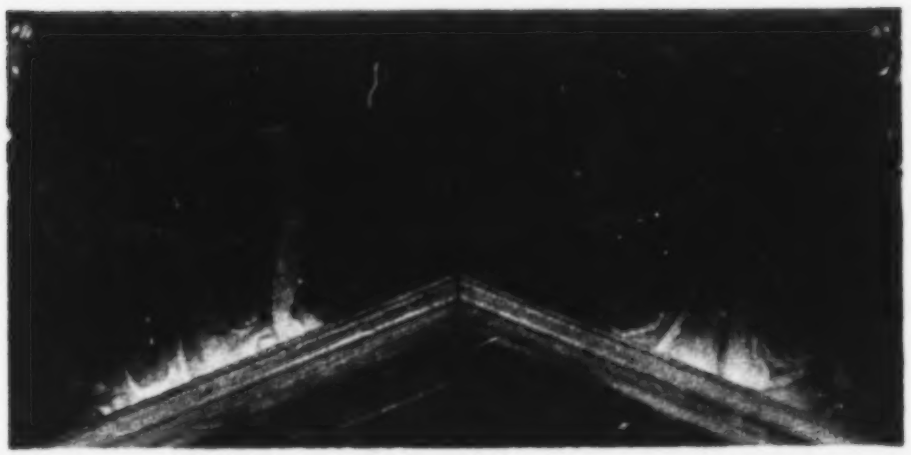
11a-3

U.S. Courthouse / Federal Building in Cleveland, Ohio
Blashfield's mural "The Law"

Detail

11a-4

U.S. Courthouse in Indianapolis, Indiana
Van Ingen's "Appeal to Justice"

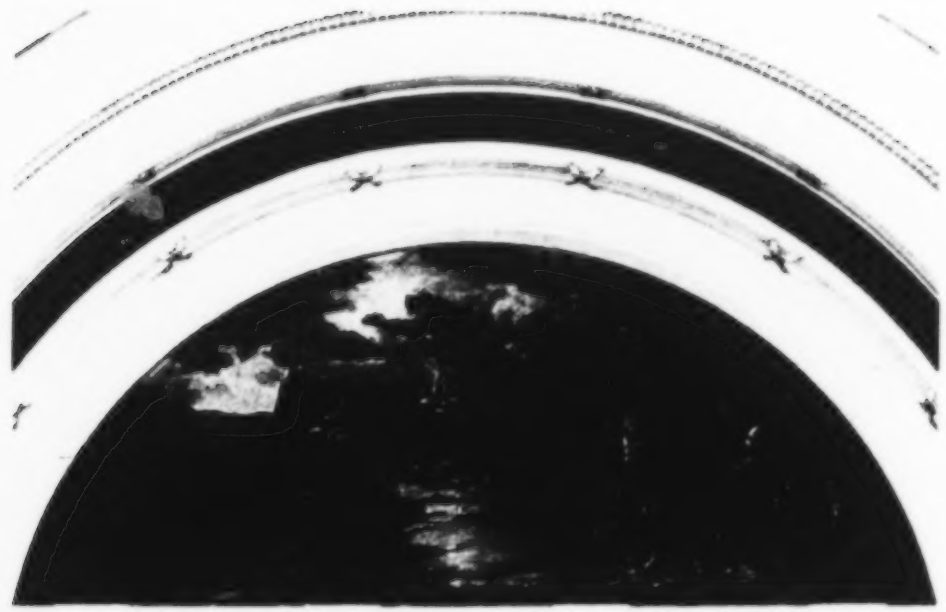


Detail

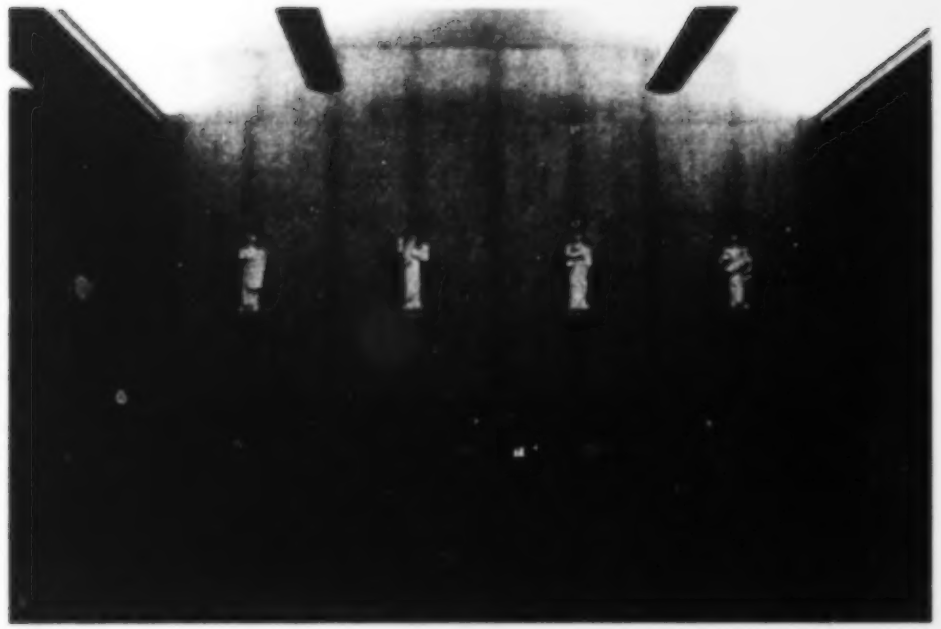
11a-5

Pennsylvania Supreme Court
"The Decalogue — Hebrew Idea of Revealed Law"

Cuyahoga County Courthouse in Cleveland, Ohio
Statue of Moses Overlooking Main Entrance



Minnesota Supreme Court
Moses Receiving the Ten Commandments



U.S. District Courthouse, Washington, D.C.
Statues of Hammurabi, Moses, Solon, Justinian

Chester County Courthouse
Chester County, Pennsylvania

Monroe Place Courthouse
New York Appellate Division, Second Judicial Department
Brooklyn, New York
Bas-Relief of Moses

Boston Public Library,
Central Panel of North Wall
Mural of Moses by J.S. Sargent

Ronald Reagan Building and International Trade Center
Washington, D.C.

National Archives Building
Washington, D.C.

Library of Congress, Washington, D.C.
Statue of Moses Overlooking Main Reading Room

APPENDIX C

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5. *Teaching questionnaire construction effectively: The Ten Commandments of question writing*, Ellard, John H., Contemporary Social Psychology

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No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FAMILY ASSOCIATION CENTER FOR LAW & POLICY IN SUPPORT OF RESPONDENTS

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January 31, 2005

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INTEREST OF AMICUS CURIAE[1]

Amicus, American Family Association Center for Law & Policy (AFA CLP), is the legal arm of American Family Association, Inc., a pro-family organization incorporated in 1977 under the name of National Federation for Decency, Inc. with hundreds of thousands of supporters nationwide. AFA CLP is a public interest-type law firm specializing in First Amendment litigation. AFA CLP attorneys have participated as amicus curiae in numerous cases in this Court. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. American Library Ass'n*, 539 U.S. 194 (2003); *American Coalition of Life Activists*, 539 U.S. 958 (2003); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Children's Legal Foundation, Inc. v. Action for Children's Television*, 537 U.S. 886 (1992); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

Additionally, AFA CLP attorneys have litigated cases involving Establishment Clause challenges to public displays of the Ten Commandments, most recently in *Baker v. Adams County*, 86 Fed. Appx. 104, 2004 WL 68523 (6th Cir. 2004), *petition for cert. filed*, 72 USLW 3769 (June 14, 2004). As a result, AFA CLP has developed an expertise and keen interest in this area of the law and believes its perspective may be of benefit to the Court.

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

I. *LEMON*[2] MUST BE REPLACED

This Court's Establishment Clause jurisprudence is "in hopeless disarray." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). The *Lemon* test has resulted in an endless line of confusing and conflicting decisions which serve little or no precedential value and leave both lower courts and citizens alike groping to discern the constitutionality of contemplated governmental action. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*"). As one commentator on *Lemon* has observed, "[i]n thirty years the test has earned nothing but ridicule from both academia and the bench." Adam M. Conrad, Note, *Hanging The Ten Commandments On The Wall Separating Church And State: Toward A New Establishment Clause Jurisprudence*, 38 Ga. L. Rev. 1329, 1356 (2004).[3]

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[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[3] This point is more fully developed in several briefs filed in support of the displays in this case. *See, e.g.,* Petitioners' Brief in *McCreary County, Kentucky v. ACLU*; Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund, 2004 WL 2825470, *4; Brief of Amicus Curiae The Rutherford Institute, 2004 WL 2825468, *13; Brief of Amicus Curiae Pacific Justice Institute, 2004 WL 2851010, *6. Curiously, not a single brief supporting the respondent in *McCreary County* or the petitioner in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003) could be found questioning the wisdom of retaining *Lemon*. *See, e.g.,* Brief of Amici Curiae American Humanist Association, et al., 2004 WL 2911173, *8 ("The Lemon test, as a 'fail one, fail all' three-prong test, is a sensible reflection of the values embodied in the Establishment Clause, and remains an eminently workable and dynamic model to assess the constitutionality of government activity"); Brief of Amicus Curiae Council for Secular Humanism, 2004 WL 2899174, *19. One

(Continued on following page)

A. *Lemon* is Unduly Fact-Sensitive.

The Fifth Circuit accurately described the inquiry under *Lemon* as "fact-sensitive," and noted that placing the Ten Commandments monument in the proper context is "a delicate task." *Van Orden v. Perry, supra*, 351 F.3d at 178. In fact, the test has devolved into a highly subjective, hyper-fact-sensitive analysis that yields different results from different judges, depending on the inclinations and biases of the judges and on precisely how they choose to weigh and balance the various factual nuances of the case before them.

This mulling of minutiae[4] is not law; it is the setting of social policy. And under our constitutional system, setting policy is the business of the legislature, not the courts. *See, e.g., Furman v. Georgia,* 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) ("[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, (1943) (Frankfurter, J., dissenting) (the Court is not "free to act as though we were a superlegislature").

Amici opposing the displays in these cases amply demonstrate the absurdity of this state of affairs, arguing for instance that the use of a particular translation renders the Texas monument unconstitutional (*see* Brief of Amicus Curiae Anti-Defamation League, 2004 WL 2911167, *25),

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group of amici, National School Boards Association, et al., supports neither party, but urges the Court to replace *Lemon* with an endorsement test. This disparity alone signals a serious concern with the continued viability of the *Lemon* test.

[4] As Mr. Justice Kennedy has commented, the Court has embraced a "jurisprudence of minutiae." *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring and dissenting).

and that because the Texas display lies on the exact line between the legislature, the governor's office, and the supreme court, it constitutes an impermissible endorsement of religion. *See* Brief of Amicus Curiae Council for Secular Humanism, 2004 WL 2899174, *13.[5]

B. In Practical Effect, *Lemon* Favors Irreligion over Religion.

The *Lemon* test has effectively codified anti-religion, not neutrality, as the status quo. *See, e.g., Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 780 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002) (Coffey, J., dissenting) (using *Lemon* to find passive Ten Commandments monument in violation of Establishment Clause has brought us "to a point where irreligion is favored over religion"). Employing *Lemon*, organizations and individuals bent on removing all vestiges of religion from the public square have successfully petitioned the courts to strike everything from crèche displays to crosses on city seals to a sticker in science textbooks explaining that evolution is a just a theory. *See, e.g., American Civil Liberties Union of New Jersey v. Schundler*, 104 F.3d 1435 (3d Cir.), *cert. denied*, 520 U.S. 1265 (1997); *American Civil Liberties Union v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998); *Selman v. Cobb County Sch. Dist.*, 2005 WL 83829 (N.D. Ga. 2005).[6]

[5] This sort of landscape argument led Judge Coffey of the Seventh Circuit to warn that courts "should not be in the business of monument design." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 776 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002) (Coffey, J., dissenting).

[6] In *Selman*, the sticker read in its entirety stated: "This textbook contains material on evolution. Evolution is a theory, not a fact,

(Continued on following page)

Additionally, although this Court has repeatedly stated that the Establishment Clause forbids hostility against religion, *e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989), under *Lemon*, government hostility toward religion has routinely been upheld. *See, e.g., American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1119, 1122-23 (9th Cir.), *cert. denied*, 537 U.S. 886 (2002) (upholding resolution condemning Christian ministries' "hateful rhetoric against gays" in their "Truth in Love" campaign offering hope for change from homosexuality through Jesus Christ; holding that primary effect of resolution was not hostility, but "encouraging equal rights for gays and discouraging hate crimes"); *Okwedy v. Molinari*, 69 Fed. Appx. 482, 2003 WL 21492487 (2d Cir. 2003) (ministry's public display of Bible verse on billboard was declared by Borough President Guy Molinari to be "mean-spirited" and to "convey an atmosphere of intolerance which is not welcome in [New York City]," after which billboard was immediately removed by billboard owner, in breach of ministry's contract; Establishment Clause claim dismissed).

In practice, the *Lemon* test has been a one-way street: benign religious displays and symbols are condemned,

regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered." 2005 WL 83829, *4. Based on this simple statement, and applying the *Lemon* test, the judge reasoned that "[a]n informed, reasonable observer would understand the School Board to be endorsing the viewpoint of Christian fundamentalists and creationists that evolution is a problematic theory lacking an adequate foundation." *Id.* at *20.

while overt government hostility toward religion is condoned.[7] It is time for *Lemon* to be jettisoned.

C. *Lemon* Turns the Establishment Clause from a Shield Intended to *Protect* Religious Freedom into a Sword Used to *Harm* Religion.

The original intent of the Establishment Clause was both to prevent the establishment of a national church and to protect "individual states against federal interference with existing church-state relationships." DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW 65, 66 (1987); *see also, Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S.Ct. 2301, *2330 (2004) (Thomas, J., concurring) (citing AKHIL AMAR, THE BILL OF RIGHTS 36-39 (1998)). That is, it was adopted for the purpose of protecting religion and religious freedom. However, over time, the *Lemon* test has turned this shield into a sword wielded against the very religious freedom the Clause was initially designed to protect.

"To the extent that *Lemon's* purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance." Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 129 (1992). After all, hostility toward religion is itself a secular purpose.

[7] In fact, even purveyors of rank obscenity receive more protection under the First Amendment than those who wish to display the Ten Commandments in public, at least in the Western District of Pennsylvania. *See United States v. Extreme Associates, Inc.*, 2005 WL 121749 (W.D. Pa. 2005).

Conversely, when there is any hint of religious motive behind government action, however indirect, no stone is left unturned in the efforts to root it out and decree the act unconstitutional. *See, e.g., American Civil Liberties Union v. McCreary County*, 354 F.3d 438, 455-56 (6th Cir. 2003) (finding "evolution" of displays from religious motivation relevant to purpose prong of *Lemon*, notwithstanding sworn testimony to the contrary); *Baker v. Adams County*, *supra*, 86 Fed. Appx. 104, 110 ("The fact that the monument was donated by the Adams County Ministerial Association, a Christian religious organization that also agreed to indemnify the Board for any litigation expenses, implies" an illicit purpose under *Lemon*, irrespective of the school board's secular motive in accepting the monument.).

And while numerous cases have held government actions unconstitutional because they were found to have had a primary effect of *advancing* religion, "[n]o court in any jurisdiction has struck down a law that allegedly had the primary effect of *inhibiting* religion." *See* Andrew R. Cogar, Note, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. Va. L. Rev. 279, 310 (2002).

When religious practices have been permitted under *Lemon*, they have usually been those of a minority religion or sect, while even voluntary practices of a perceived mainstream religion are disallowed. For example, in *Mellen v. Bunting*, 327 F.3d 355, 371-372 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 1750 (2004), the custom of offering a *voluntary* prayer in the Judeo-Christian tradition before the evening meal at Virginia Military Institute was held to

violate the Establishment Clause. By contrast, in *Yacovelli v. Moeser*, 2004 WL 1144183, *13 (M.D.N.C. 2004), a *mandatory* assignment for incoming freshmen to read a book containing lengthy portions of the Koran and listen to a recording of an Islamic imam chanting a call to prayer in Arabic was upheld.

Furthermore, in those rare instances in which a mainstream religious practice was upheld, courts have usually done so only when the practice was deemed stripped of all religious meaning. *See, e.g. Newdow, supra,* ___ U.S. ___, 124 S.Ct. 2301, 2323 (2004) (O'Connor, J., concurring) (some official references to God "can serve to solemnize an occasion instead of to invoke divine provenance," including the national motto, the national anthem, and the prayer with which this Court opens).

D. *Lemon* Fails to Provide Narrow Guidelines Ensuring Against Unbridled Judicial Discretion.

It has long been held by this Court that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *see also, Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). But while government officials from the executive branch are prohibited from abusing their discretion in the regulation of First Amendment conduct under the watchful eye of the judiciary, there are few restraints placed upon the judicial branch itself when deciding matters involving First Amendment religious freedoms.

It takes little imagination to envision the outcry that would result if a permit for a public demonstration was sought from a small-town police chief who had reserved discretion to select the appropriate guidelines from among several diverse and often conflicting choices, many of which called upon him to discern whether the applicant was motivated by any hidden religious purpose, or what the "reasonable observer" might surmise as to the primary effect of the demonstration. Such a permit scheme would be stricken as blatantly unconstitutional. Yet this Court's Establishment Clause jurisprudence allows just such unbridled discretion to be exercised by the judiciary.

While this Court's First Amendment jurisprudence concerning licensure of speech is rooted in objective criteria, the *Lemon* test is by nature essentially subjective. *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (requiring objective guidelines to limit discretion of the licensor).

For example, the endorsement test does not offer any real objective standard. For the "reasonable observer" knows only what a court posits he knows, and believes only what the court imputes to him. In truth, the reasonable observer prong serves no legitimate purpose other than to cloak the subjective predilections of the court in the garb of objectivity. As Mr. Justice Scalia has stated, the endorsement test "supplies no standard whatsoever." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995).[8]

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[8] The inherent subjectivity of the analytical tests used in this area of the law may explain why, according to one report, "the single most prominent, salient, and consistent influence on judicial decisionmaking

(Continued on following page)

Similarly, to uphold an inherently religious practice on grounds of "ceremonial deism" is to strip it of all true religiosity. As Justice O'Connor wrote in support of the constitutionality of the Pledge of Allegiance, "only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism." *Newdow, supra*, 124 S.Ct. at *2324 (O'Connor, J., concurring). To constitute ceremonial deism, it "cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority." *Id.* at *2325; *see also Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (suggesting that the reference to God in the Pledge might be permissible because it had "lost through rote repetition any significant religious content"). That is, only because the phrase "under God" was deemed to have lost its religious meaning, it would pass muster under the "ceremonial deism" analysis. This test is therefore just another variation on the decades-old theme of favoring irreligion over religion.

As if that were not enough, the Court has also reserved to itself the right to dispense with *Lemon* altogether whenever it chooses to do so, leaving government officials and the public in confusion as to what standard will apply in the future and how it will be interpreted. Such a system may have been appropriate for an ancient Greek city-state seeking an oracle, but it will not suffice

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was religion – religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community." Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *Searching For The Soul Of Judicial Decisionmaking: An Empirical Study Of Religious Freedom Decisions*, 65 Ohio St. L.J. 491, 614 (2004).

for America, which boasts itself a nation of laws and not of men.

II. THE ESTABLISHMENT CLAUSE HAS NO APPLICATION TO THE INSTANT CASES.

The Establishment Clause properly understood does not apply to the instant cases at all, as noted by Mr. Justice Thomas in *Newdow*, *supra,* at *2328, and demonstrated by other amici. *See, e.g.,* Brief of Amici Curiae Conservative Legal Defense and Education Fund, et al., 2004 WL 2812087, *10; Brief of Amicus Curiae Eagle Forum Education and Legal Defense Fund, 2825470, *9.

For many years, this Court recognized a jurisdictional limitation on the application of the Clause to the states. *See, e.g., Barron v. Baltimore*, 32 U.S. (7 Peters) 243, 250 (1833) ("These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."); *Ex parte Garland*, 71 U.S. 333, 397-98 (1867) ("the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions").

And the passage of the Fourteenth Amendment did not alter this fact.[9] *See, e.g., Jaffree v. Board of School Com'rs of Mobile County*, 554 F.Supp. 1104, 1119 (D.Ala. 1983), *aff'd in part, rev'd in part*, 705 F.2d 1526, *rev'd*, 472 U.S. 38 (1985) ("The historical record clearly establishes

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[9] It has been said that incorporation of the Establishment Clause is "logically impossible; it would be like trying to apply the Tenth Amendment to the states." *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 95 (1987).

that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states."); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74-78 (1873).[10]

III. AN ALTERNATIVE TO *LEMON*

Given the frequent though inconsistent use of *Lemon*, its longevity, and the wide acquiescence in the fiction of incorporation, it is unlikely this Court will forego all application of the Establishment Clause against state action. In light of this probability, Amicus suggests the following alternative to the *Lemon* test.

As a threshold matter, it is necessary to set out the goals of a new test. First, an analytical device for determining the constitutionality of a governmental practice under the Establishment Clause requires clarity, simplicity, and objectivity. After all, the text itself is only ten words; to require numerous different analytical tests depending on the category of activity at issue is at best unnecessary and at worst meaningless. Surely the drafters did not envision or intend such complexity.

Second, the test should apply universally to all claims brought under the Clause, whether they involve silent

[10] Between 1870 and 1950 the Blaine Amendment or similar proposals, which would have made the First Amendment applicable to the states, were considered and rejected by Congress on at least 25 occasions. *See* DREISBACH, *supra*, at 92. Obviously, had Liberals and others believed the Fourteenth Amendment had already "incorporated" the Bill of Rights, passage of the Blaine Amendment would have been superfluous. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 296-302 (2002). Neither did the Liberals find any legal significance to Jefferson's letter to the Danbury Baptists. *Id.* at 302 n.39.

displays of religious symbols, public proclamations of faith, or preferential financial treatment. The touchstone of true law is universality. The ideal of "equal justice under law" is not attainable unless the same law applies to all. *See* Ashley M. Bell, *"God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled With The Secularization Of Historical Religious Expressions*, 50 Am. U. L. Rev. 1273, 1280 (2001) (suggesting need for single test).

With these goals in mind, Amicus offers the following alternative.

A. The Establishment Clause Should not Apply Absent Legislative Action.

Even if the fiction of incorporation is to be maintained, the plain text of the First Amendment should nonetheless be the starting point for determining applicability of the Clause. "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-492 (1939) (Frankfurter, J., concurring).

The text specifically addresses a "law" respecting an establishment of religion. It would therefore be altogether reasonable and appropriate for this Court to restrict the application of the Establishment Clause only to acts of a legislative body, whether state or federal, constituting some sort of "law," and not to the erection of passive displays such as those here at issue. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221 (1963) (the Establishment Clause "withdrew all *legislative* power respecting religious belief or the expression thereof.") (emphasis added). According to BLACK'S LAW

DICTIONARY, a "law" is "[t]hat which must be obeyed and followed by citizens subject to sanctions or legal consequences." BLACK'S LAW DICTIONARY 795 (5th ed. 1979).

Application of this threshold requirement would immediately dispense with cases such as *McCreary County*, since it involves no legislative action. *Van Orden* would also be affirmed because mere acceptance of the monument involved no enactment of a "law."[11]

B. The Establishment Clause Should not Apply Absent Legal Coercion.

Prior to *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), protection against the threat of legal coercion constituted the essence of the Establishment Clause. True establishment at the time of the founding required actual legal coercion, such as requiring official oaths recognizing the king as head of the church, the funding of tax-supported ministers, and fines for those whose children had not been baptized. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment Of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116-2119 (2003) (citing Virginia laws as representative of many throughout the South); *see also, Newdow, supra,* *2331-32 (Thomas, J., dissenting) ("[t]he traditional 'establishments of religion' to which the Establishment Clause is addressed necessarily involve actual legal coercion"); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments

[11] As Chief Justice Rehnquist has counseled, "[w]hen courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies." *Newdow, supra,* at *2320 (Rehnquist, C.J., concurring).

of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.") (emphasis in original).

As McConnell summarized: "In short, the laws compelled religious observance, provided financial support for the ministry, controlled the selection of religious personnel, dictated the content of religious teaching and worship, vested certain civil functions in church officials, and imposed sanctions for the public exercise of religion outside of the established church." *Establishment and Disestablishment at the Founding, supra,* 44 Wm. & Mary L. Rev. at 2119. These practices were unabashedly coercive, and plainly violated the conscience of philosophical dissenters.

1. The Model of *Barnette*

Perhaps the seminal case applying the sort of coercion test most true to the original understanding of the Establishment Clause and the historical practice of our nation is *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, Jehovah's Witnesses challenged a mandatory flag salute for public school students, which the Court found required "a compulsion of students to declare a belief." *Id.* at 631. Failure to conform constituted insubordination punishable accordingly.

As stated by the *Barnette* Court, the issue presented was "whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." *Id.* at 636. In striking the law, the Court famously cautioned that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641.

Barnette teaches that "the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id.* In our free system, there is no place for forced consent: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

The Court ultimately held that the compulsory flag salute violated the First Amendment because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*

2. Fashioning a *Barnette*-Type Test

Although a majority of this Court has not insisted on a showing of coercion in an Establishment Clause challenge, *see, e.g., Engel v. Vitale,* 370 U.S. 421, 430 (1962), the element of coercion has played an important role. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-316 (2000) (applying coercion test in addition to *Lemon*); *Lee v. Weisman*, *supra*, 505 U.S. at 592 (finding "subtle coercive pressure" in the public schools). *But see Lee*, 505 U.S. at 618 (Souter, J., concurring) (arguing that "this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement" and collecting cases).

Yet the refusal of the Court to require some coercive effect in challenges brought under the Establishment Clause accounts for much of the proliferation of such cases

and the resulting confusion in this area of law.[12] Moreover, the absence of a requirement of some harm other than a psychological offense has paved the way for the proverbial "egg-shell" plaintiff, who has lost all respect for any belief system not her own, and assumes an attitude of deep offense by the slightest acknowledgement of any conflicting beliefs. Judge Michael McConnell argues that "courts are wasting their time when they draw nice distinctions about various manifestations of religion in public life that entail no use of the taxing power and have no coercive effect. The simple answer to most such lawsuits is that the plaintiff has no standing to sue." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 939 (1985/86).

While the precise contours of what constitutes coercion may need to be worked out over time, use of an orthodoxy of belief standard would readily accommodate the pluralism of belief prevalent today but allow public officials to recognize religion without fear of a federal lawsuit. And as Judge McConnell noted, "at least attention again would be directed to the right question. Not what flunks the three-part test, but what interferes with religious liberty, is an establishment of religion." *Id.* at 941.

Finally, if such a test would not offer every citizen offended by governmental recognition of religion an avenue of judicial relief, perhaps it would facilitate a process whereby our increasingly pluralistic populace

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[12] *Cf.* the observation of Mr. Justice Thomas in *Newdow, supra*: "I conclude that, as a matter of our *precedent*, the Pledge policy is unconstitutional." *Id.* at *2330 (emphasis added). Of course, Justice Thomas went on to state that in his opinion, that precedent was wrongly decided. *Id.*

would be required to respect differing beliefs rather than file suit over them.

The hoped-for neutrality of the *Lemon* test has in reality spawned judicially-sanctioned hostility toward religion. Under the proposed legal coercion test, the "benevolent neutrality" of *Walz*[13] may again become a reality while still protecting against actual establishment of a national religion and not unduly offending non-adherents.

CONCLUSION

For the reasons stated, the *Lemon* test should be overruled, and this case affirmed.

Respectfully submitted,

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[13] "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 669 (1970).

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

(12) (26)

Nos. 03-1500; 03-1693

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN
Petitioner,
v.
RICK PERRY, *et al.*
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MCCREARY COUNTY, KENTUCKY, *et al.*
Petitioners,
v.
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *et al.*
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of *Amici Curiae*
American Humanist Association, Association of Humanistic Rabbis, American Ethical Union, Atheist Alliance International, Covenant of Unitarian Universalist Pagans, Equal Partners in Faith, Humanist Society, The Humanist Institute, HUUmanists, Institute for Humanist Studies, International Humanist and Ethical Union, Internet Infidels, National Center for Science Education, Secular Coalition for America, Skeptics Society, Society for Humanistic Judaism, Unitarian Universalist Association
In Support of Petitioner, Thomas Van Orden /Respondents, American Civil Liberties Union of Kentucky, et al.

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December 13, 2004

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INTEREST OF AMICI CURIAE[1]

The American Humanist Association is the oldest and largest humanist organization in the nation, dedicated to ensuring a voice for those with a positive, nontheistic outlook. Humanism is a progressive philosophy of life that, without supernaturalism, affirms the ability and responsibility of human beings to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism, and encourage the continued refinement of the humanist philosophy.

The American Humanist Association provides a unique viewpoint concerning the endorsement involved in the public posting of the Ten Commandments as well as the history of religious freedom in the United States because it represents a unique worldview that is without theism, holy scriptures, or absolute "commandments."

The Association of Humanistic Rabbis is the national professional organization of ordained rabbis serving congregations and other organizations within the humanistic Jewish movement.

The American Ethical Union is the federation of Ethical societies in the United States which together constitute the religious fellowship sometimes referred to as the "Ethical Culture Movement." The Ethical Culture movement is more than 128 years old with thousands of

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[1] The AHA files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici curiae*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

members nationwide. Internationally, the American Ethical Union is a founding member of the International Humanist and Ethical Union and is recognized by the United Nations as a non-governmental organization.

Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Covenant of Unitarian Universalist Pagans is an independent affiliate of the Unitarian Universalist Association created to meet the needs of Pagan-identified Unitarian Universalists. CUUPS is dedicated to educating people about Paganism, promoting interfaith dialogue, developing Pagan liturgies and instructional materials, and fostering healing relationships with mother the Earth and all her children.

Equal Partners in Faith is a multi-racial national network of religious leaders and people of faith committed to equality and diversity. Its diverse faith traditions and shared religious values lead its members to affirm and defend the equality of all people, regardless of religion, race, ability, gender, sexual orientation or gender identity. As people of faith, its members actively oppose the manipulation of religion to promote inequality and exclusion.

The Humanist Society is a nonprofit, religious organization offering humanism as a personal, family, and community lifestyle. It certifies individuals in communities throughout the United States to provide ceremonial

observances of the significant occasions of life. Founded by former Quakers in 1939, the Humanist Society trains and ordains its own ministry, who upon ordination are then accorded the same rights and privileges granted by law to the priests, ministers, and rabbis of traditional theistic religions.

The Humanist Institute educates leaders, spokespersons, and advocates to benefit all elements of the Humanist movement in a three-year postgraduate certificate program. It also serves as a think tank to explore Humanism and its values in its present form and future evolution.

The HUUmanists are an independent affiliate of the Unitarian Universalist Association. Within this context HUUmanists practice, promote, enhance, and enjoy Humanism; provide a continental organization for humanists; and defend and protect humanism and freedom of thought. HUUmanists achieve these goals by arranging programs, forums, and lectures; publishing humanist writing to give voice to humanist values; encouraging the establishment of local humanist groups, and maintaining a humanist presence on the Internet. Founded in 1962 the HUUmanists' primary publications are the semi-annual journal *Religious Humanism* and the quarterly newsletter *HUUmanists News*.

The Institute for Humanist Studies is a think tank based in Albany, New York, whose mission is to promote greater public awareness, understanding, and support for humanism. The Institute specializes in pioneering new technology for the advancement of humanism and also engages in grassroots and legislative advocacy in order to further the rights and interests of the non-religious. Founded in 1999, IHS provides accessible and authoritative information about humanism to academia, the media, and the general public, while providing financial grants to other non-

religious groups in its effort to bring the humanist movement into a more cooperative relationship.

The International Humanist and Ethical Union is the world federation of humanist organizations. It is the sole world umbrella organization embracing humanist, atheist, rationalist, secularist, skeptic, laique, ethical cultural, freethought, and similar organizations worldwide. The IHEU has specialist consultative status at the United Nations in New York, Geneva and Vienna; general consultative status with the Council of Europe; and maintains operational relations with United Nations Educational, Scientific, and Cultural Organization in Paris.

The Internet Infidels run the *Secular Web* (www.infidels.org), the largest and most viewed website relating to atheism, humanism, freethought, and a scholarly critique of religion.

The National Center for Science Education is a nonprofit membership organization that supports the teaching of evolution in the public schools and opposes the presentation of religious views (such as creationism) in the science classroom.

The Secular Coalition for America's mission is to increase the visibility and respectability of nontheistic viewpoints within the United States and to protect and strengthen secular government as the best guarantee of freedom for all. Its members are national atheist, freethought, humanist, and secular organizations committed to cooperative action in areas of mutual interest and concern. The Coalition promotes liberties of conscience for the approximately thirty million American citizens who hold nontheistic worldviews.

The Skeptics Society is a nonprofit organization specializing in science education and research through a monthly science lecture series at the California Institute of Technology, the publication of *Skeptic* magazine, the publication of *Jr. Skeptic* magazine for students, the publication of the *Baloney Detection Kit* for teachers, the publication of the *Baloney Detection Books* for students, research on belief systems and the influence of culture and politics on science and science education, and the promotion of science and critical thinking.

The Society for Humanistic Judaism is the central body of the national humanistic Jewish movement. The Society's mission is to mobilize people to celebrate Jewish identity and culture consistent with a humanistic philosophy of life. The Society assists in organizing and supporting congregations and in providing a voice for its members.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.

Amici file this brief with the consent of all parties. The letters granting consent are enclosed herewith.

SUMMARY OF ARGUMENT

The *Lemon* test is a sensible reflection of the values embodied in the Establishment Clause and remains an eminently workable and dynamic model to assess the constitutionality of government activity. Just as the

Establishment Clause itself embodies multiple values, so must the tests that this Court employs to decide acceptable Constitutional parameters. Because of our unique national history, it is now widely accepted that our government cannot legislate in a manner that endorses one religion over others, or religion generally. It is equally clear that our system of government is not designed to undertake actions, the principal purpose or effect of which is to advance religion, and that our government must not allow itself to become excessively entangled with religion or religious matters. As difficult as it may be to navigate the challenges presented when our collective civic and religious values conflict, it is imperative that we respect the constitutional values that give meaning to the Establishment Clause. Those values are adequately represented in the three-pronged *Lemon* test as it has evolved and been refined through this Court's decisions.

The Ten Commandment displays at issue in *McCreary* and *Van Orden* violate the Establishment Clause by failing to satisfy one or both of the religious purpose and effects tests set forth in *Lemon*. The "plainly religious" nature of the Ten Commandments justifiably elevates courts' skepticism of proffered legislative purposes for posting them, and this Court is also correct to examine the context, content, and history of Ten Commandment displays in order to decipher true legislative purposes. The nature of the analysis required under the Establishment Clause mandates this comprehensive examination, and early indications of religious or secular purposes clearly and importantly assist the courts in determining whether particular legislative actions are wholly, partly or predominantly secular or religious.

The purported purposes for the displays at issue in *McCreary*, while perhaps appearing secular in their final

version, are nevertheless predominantly religious. In *McCreary* this is exacerbated by the clear religious purpose of the original and second display efforts, and by the superficial and misguided attempt to characterize the historical contributions of the Ten Commandments to our nation's legal system. In *Van Orden* the purported purpose cannot be characterized as "bona fide, legitimate, and not a mere sham" because of the plainly religious nature of the Ten Commandments monument and the absence of a logical connection between the monument's display and the purported purpose.

The displays at issue in *McCreary* and *Van Orden* violate the "effects" prong of the *Lemon* test. When employing the "objective observer" standard, it is clear that the primary effect of the displays is to advance religion, specifically Christianity and Judiasm. It is also clear that surrounding the Ten Commandments with secular objects communicates government endorsement of religion, especially when, as is the case here, there is no effort to explain the historical, legal or cultural relevance of the Ten Commandments to the secular objects. The display of any version[2] of the Decalogue on public property under the circumstances presented in these cases has the clearly discernable effect of communicating government endorsement of religion (specifically monotheism). These displays also violate the "coercion" test that this Court employs in Establishment cases.

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[2] There are at least five distinctive versions of the Decalogue. This is important because the "deep theological disputes" that account for the different versions trigger further Establishment Clause infractions when one version is chosen to the exclusion of the others. *See* Steven Lubet, *The Ten Commandments in Alabama*, 15 Const. Comment. 471, 478 (1998) (concluding that "it takes naïveté ... to believe that a single rendition of the Ten Commandments could be considered universal and nonsectarian).

ARGUMENT

Under *Lemon v. Kurtzman* And Our Establishment Clause Jurisprudence, This Court Should Affirm The Sixth Circuit's Decision In *ACLU of Ky. v. McCreary County, Ky.* And Should Reverse The Fifth Circuit's Decision In *Van Orden v. Perry* Because None Of The Ten Commandment Displays At Issue Advance From A Legitimate, Bona Fide, Secular Purpose, And All Of Them Have The Effect Of Endorsing Religion.

I. The Lemon Test, As A "Fail One, Fail All" Three-Prong Test, Is A Sensible Reflection Of The Values Embodied In The Establishment Clause, And Remains An Eminently Workable And Dynamic Model To Assess The Constitutionality Of Government Activity.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. At the heart of the Establishment Clause is the idea that, at a minimum, a state or federal government cannot establish or endorse religious belief or activity or engage in activity the principal effect of which is to endorse or advance religion. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989). "The Establishment Clause, at the very least, prohibits governments from appearing to take a position on questions of religious beliefs or from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.*

In the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court established a three-prong test to assess whether government activity is impermissible under the

Establishment Clause. Under the *Lemon* test, as originally formulated, reviewing courts are required to consider whether: (1) the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *Lemon*, at 612-13. This Court has used the *Lemon* test since the test's inception as a framework and guide for analysis on the constitutionality of government activity. This continued use of *Lemon* reinforces the underlying values of the Establishment Clause: that the government should not be acting with religious motivations, that its actions should not have the effect of advancing religion, and that it should not meddle or become entangled in religious affairs.

Although not perfect, the structure and approach of the *Lemon* test is a "common sense" methodology and remains the best tool for sorting through the inherently conflicting values in Establishment Clause cases. In any Establishment Clause case, a reviewing court is required to undertake the difficult task of determining where the line should be drawn between permissible First Amendment speech and/or activities covered by the Free Exercise Clause and impermissible government endorsement of religious activity under the Establishment Clause. The Establishment Clause provides very little guidance as to how this line should be drawn, but it does inspire the three necessary parameters to make this determination: (1) purpose, (2) effect, and (3) entanglement.

The *Lemon* test provides the best way for a court to go about making this decision, and it has been effective precisely because it forces a reviewing court to assess the constitutionality of legislative motivations and the results of their legislation, while continually respecting the maxim that the government should not involve itself in religious affairs.

In endeavoring to adhere to the mandates of the Establishment Clause, it was both necessary and helpful for the Court to create the three different methods of review set forth in *Lemon*.

For thirty-three years this Court has continued to use the *Lemon* test as the paramount guiding framework to determine whether the government's conduct is constitutional under the Establishment Clause.[3] The refining of the *Lemon* test over the years is proof that it is an eminently workable model to both assess the constitutionality of government conduct and foster an organic dialogue about the underlying social, religious, and constitutional values at play in Establishment Clause cases. Indeed, the adoption of the reasonable observer[4] standard in the endorsement/effects analysis illustrates the constantly evolving nature of our Establishment Clause jurisprudence and the flexible nature of the *Lemon* doctrine.

II. In *Van Orden* and *McCreary* The Predominant Purpose For Posting The Ten Commandments Was Religious, Thus Violating The Establishment Clause.

[3] *See, e.g. Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Allegheny*, 492 U.S. 573; *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980); *Comm. For Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

[4] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Aguillard*, 482 U.S. 578; *Allegheny*, 492 U.S. 573.

A. The Court Must Examine The Content, Context, And History Of The Ten Commandments Displays In Order To Distinguish Sham Secular Purposes From Sincere Ones.

The Court's analysis of Appellants' actual purpose for posting the Decalogue must examine the content, context, and evolution of the displays at issue. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (stating that courts must examine the circumstances surrounding the governmental enactment and the conduct of the [appellants] throughout the dispute to determine primary purpose). This is because it is the "duty of the courts to 'distinguish a sham secular purpose from a sincere one.'" *Id.* (quoting *Wallace*, 472 U.S. at 75 at 75).

This comprehensive analysis must include an examination of the legislature's "original purpose" for erecting religious displays because it is the only way to effectively perform the purpose analysis under *Lemon*. *See Books v. City of Elkhart*, 235 F.3d 292, 295, 303-304 (7th Cir. 2000); *Gonzales v. North Tp. of Lake County, Ind.*, 4 F.3d 1412, 1420-21 (7th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1413-14 (7th Cir. 2001). The evolution of the actual display is helpful in distinguishing sham secular purposes from actual ones. This is important because, as the situation in *McCreary* demonstrates, it is not difficult to concoct a secular purpose in order to oppose removal of a religious display. This capacious examination is also necessary in situations like in *Van Orden*, where the purpose for erecting a specifically religious monument must be evaluated in the context of the conduct and activity occurring *after* a proposed secular purpose is offered. *See Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003).

B. The Content, Context, And History Of The Monument In *Van Orden* Clearly Shows That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious.

Because the purpose prong "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes," *Aguillard*, 482 U.S. at 592-94, it is reasonable that the "plainly religious" nature of the Ten Commandments would render their posting on public property facially suspect. Indeed, the specifically Christian and Jewish precepts, "I AM the LORD thy God," "Thou shalt have no other gods before me," "Thou shalt not make to thyself any graven images, and "Thou shalt not take the Name of the Lord thy God in vain," tend toward the reasonable inference that the displaying government has a primarily religious (specifically monotheistic) purpose for displaying and maintaining the monument. *See id.* at 585 ("This intention may be evidenced by promotion of religion in general ... or by advancement of a particular religious belief.") (citing *Stone*, 449 U.S. 39).

Although the purported purpose in *Van Orden* was to "recognize and commend a private organization for its efforts to reduce juvenile delinquency," *Van Orden*, 351 F.3d at 178, the State cannot employ a religious means to serve otherwise secular interests. *See Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 265 (1963) (Brennan, J., concurring). Whenever a government entity can achieve a secular end through either secular or religious methods, and it chooses the religious method to accomplish its goals, its motivations are suspect. *See Allegheny*, 492 U.S. at 618 (Blackmun, J., concurring). Furthermore, in 1993, several years after the purported secular purpose was offered, the monument was

re-positioned "on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building ... *to reflect the role of the Commandments in the making of law*." *Van Orden*, 351 F.3d at 181 (emphasis added). This is analytically identical to the purposes rejected by the 6th Circuit in *McCreary* and the Supreme Court in *Stone*. Furthermore, in this situation it is simply illogical to grant that efforts to honor a private organization could or should justify the posting and maintaining of a religious monument in a manner that, as will be addressed below, constitutes a clear endorsement of religion.

C. The Content, Context, And History Of The Displays In *McCreary* Clearly Show That The Government's Purported Purpose Was A Sham And That The Primary Purpose Was Religious.

In *McCreary*, the first display only contained the Ten Commandments, the second display supplemented the first with textual excerpts celebrating religion, and the third display simply surrounded the Ten Commandments with new secular and patriotic items. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 440-444 (6th Cir. 2003) ("*McCreary County II*"). At the beginning of this process the Kentucky officials (specifically Mr. Greene) professed his religious reasons for erecting the displays before conceding that the purpose was to "demonstrate America's Christian heritage," *McCreary County I*, 96 F.Supp.2d 667, 674 (E.D. Ky. 2000). The purported purpose was again amended "to demonstrate that the Ten Commandments were part of the foundation of American law and government ... [and] [to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the

Declaration of Independence and the foundation of our legal tradition.'" *McCreary County II*, 354 F.3d at 446-47.

Given the changing nature of the displays and purported purposes, it is clear that the only consistent motivation for the appellants was an effort to display the Ten Commandments on public property. Simply put, the main secular purpose that was proffered during the most recent stages of litigation was not present when the first and second displays were erected. It is difficult to find a better example of a "sham" purpose, and this Court should not give effect to Appellant's ad hoc efforts to cloak its predominantly religious motivations. *See Stone*, 449 U.S. 1104 (rejecting a conceptually identical sham purpose).

Just as the religious nature of the Ten Commandments has not changed since this court's decision in *Stone*, neither have the religious motivations of the Kentucky authorities. In *McCreary*, as in *Stone*, the "pre-eminent purpose" for posting the Ten Commandments was "plainly religious." *Stone*, 449 U.S. 39, 41 (1980). Where a "government intention to promote religion is clear," *Aguillard*, 482 U.S. at 585, this Court has consistently found the government action to violate the Establishment Clause despite government assertions of sincere nonreligious purposes. *See Stone*, 449 U.S. 39; *Aguillard*, 482 U.S. 578; *Wallace*, 472 U.S. 38; *Schempp*, 374 U.S. 203. The "sham" nature of Appellants proffered purpose is further illustrated by their utter "fail[ure] to integrate the Ten Commandments with a secular subject matter." *McCreary County II*, 354 F.3d at 453-54.

D. Respondents Have Failed To Exert Even A Mild Effort To Educate Citizens About The Ten Commandments As The "Foundation of American Law And Government," Or The "Moral Background Of The Declaration Of Independence And The Foundation Of Our Legal Tradition," Showing These Purported Secular Purposes To Be A Sham.

The most recent set of purposes advanced by Appellants in *McCreary* to justify the display of the Ten Commandments are sham purposes, partly because the current displays cannot reasonably effectuate their own purported purposes and partly because it does not appear that they were even designed to do so. These purposes are "to demonstrate that the Ten Commandments are part of the foundation of American Law and Government ... [and] their significance in providing the 'moral background of the Declaration of Independence and the foundation of our legal tradition;'" and "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." *McCreary County II*, 354 F.3d at 446.

In light of the lack of evidence supporting the historical assertions of Appellant's proffered purposes and the absence of a comprehensive explanation that is required for the display to qualify as "an appropriate study of history, civilization, ethics, comparative religion, or the like" under *Stone*, 449 U.S. at 42, it is remarkable that the Appellants can actually suggest that their Ten Commandment displays were erected for remotely non-religious reasons. It would be extraordinarily difficult to accomplish these goals through even the most extensive exhibit of the Ten Commandments, let alone the displays erected by Appellants.

The displays in both the schools and the courthouses utterly fail to demonstrate even Appellants' own alleged connection between the Ten Commandments and American

law and government. Regarding the school installations, the prefatory text contains no factual information whatsoever. Instead it provides a brief resuscitation of the School Board's opinion that the documents in the displays "have had particular historical significance in the development of this country." *McCreary County II*, 354 F.3d at 450. Perhaps the only thing that is more vague and unsupported than this proffered opinion is the purpose it allegedly supports.

The text accompanying the courthouse display is equally conclusory. As support for the claim that the Ten Commandments "profoundly influenced . . . the formation of our country," it offers as "clear" evidence the Declaration of Independence's reference to a "Creator," *Id.* at 451, even though the term "Creator" is nowhere in the courthouse version of the Ten Commandments, *see id.* at 443, n. 2. The text then concludes with the overbroad and unsupported contention that "[t]he Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *Id.* at 446-47. This bald assertion was also devoid of any historical proof, substantiated commentary or plausible support. It is difficult to imagine a legitimate, bona fide purpose being so far off the mark from its proponent's efforts to effectuate it, but not as difficult as it would be (assuming they wanted to) for them to actually accomplish it.

E. The Purported "Historical" Purposes At Issue Are Difficult Or Impossible To Effectuate And Should Not Be Given Approval By This Court.

Appellants would have to sacrifice objectivity and intellectual honesty in order to demonstrate that the Ten Commandments are the moral background of the Declaration of Independence and the foundation of our law and

government. The most fundamental expressions of our system of government – the Declaration of Independence, the Constitution, and the Bill of Rights – have explicitly rejected the religious ideology propounded in the Ten Commandments. Appellants' stated purposes are a sham because they are simply untenable assertions the sole purpose of which is to provide secular cover for the State to advance a particular religious viewpoint.

The claim that the Declaration of Independence was created against the "moral background" of the Ten Commandments is simply untrue. Thomas Jefferson, the Declaration's author, rejected claims of the purported influence of Christianity on the common law.[5] In addition, the references in the Declaration to "Creator" and "God" did not refer to the God who gave Moses the Ten Commandments, but rather the "watchmaker" God of eighteenth century deism.[6] The same man who penned the immortal, self-evident truth that all men are created equal, surely did not believe in the God of the courthouse Commandments, who warns, "[F]or I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me." *McCreary County II*, 354 F.3d 443, n. 2.

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[5] Steven K. Green, "The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law," 14 J.L. & Religion 525, 547 (1999-2000) (quoting January 24, 1814, letter from Jefferson to Adams stating that, through "judicial forgery, the Bible, Testament, and all [Church doctrine was] ingulphed into the common law without citing any authority," in Lester J. Cappon, ed., *The Adams-Jefferson Letters* 421-25 (UNC Press, 1959)).

[6] *McCreary County II*, 354 F.3d at 452-53 (citing Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* 24 (1998)). It is worth noting that Jefferson's rough draft, in which the capitalization was rather more standard than in the final version, refers to a lowercase "nature's god" and contains no reference to a "Creator."

The Constitution and the Bill of Rights reject the encroachment of religious influence even more strongly than the Declaration of Independence does. Neither mentions God at all, let alone refers to the Ten Commandments. Indeed, the first four commandments plainly contradict the First Amendment. Prohibitions against idolatry and worshipping other gods would violate the Free Exercise Clause, penalties for blasphemy would violate the Free Speech Clause and a mandate to keep the Sabbath holy would violate the Establishment Clause. The remaining six commandments are also not mentioned.[7] In fact, the only other discussion of religion is in Art. VI, which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The Constitution's own text, therefore, defeats the bold historical assertions that Appellants advance in their purported purposes.

In addition to our nation's "foundational legal" documents, state legal systems, dating from the present back to colonial days, have been overwhelmingly secular. While Puritan New England did experiment with codes based on the Decalogue, by the early 1700s the colonies abandoned this approach for the English common law, which was not based on the Bible. Green, *supra* note 5, at 542-43. Professor Green's extensive historical inquiry led him to conclude that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments." *Id.* at 558.

The texts of the most basic American documents and the history of American legal theory refute Appellants'

[7] The "Sundays excepted" clause in Art. I, Sec. 7, ¶ 2 has been grounds for debate, but this Court has previously explored the development of these laws, finding that their secular emphasis was predominant as early as the mid-1770s. *McGowan v. Maryland*, 366 U.S. 420, 433-37 (1961).

claims that the Ten Commandments provided the "moral background" for the Declaration of Independence and the foundation of our legal system. At best, the Ten Commandments influenced the founding fathers in their private lives, which they kept separate from their public offices Isolated, unsuccessful episodes of experimentation with biblical law do not show that the Ten Commandments had any direct or lasting influence on American legal traditions. Furthermore, Appellants offer no evidence that the Ten Commandments directly influenced the Declaration of Independence, as they allege in their purported purposes for displaying them. This Court should conclude that these are sham purposes, manufactured to camouflage purely or predominantly religious purposes because Appellants' have neither made an effort to achieve the purposes as stated nor shown how they could ever possibly do so.

III. The Posting Of The Ten Commandments On Public Property In *McCreary* and *Van Orden* Constitutes Government Endorsement Of Religion Because The Effect Of The Government Action Advances Religion, And An Objective Observer Would Believe That The Government Has Endorsed Religion.

A. A Reasonable Viewer Would Perceive The Display Of The Ten Commandments As A State Advancement And Endorsement Of Religion Favoring The Jewish And Christian Faiths And Their Display Therefore Has The Primary Effect Of Advancing Religion.

The "effects" prong of the *Lemon* test asks whether the government activity's "principal or primary effect" advances or inhibits religion. *Lemon*, 403 U.S. at 612-13.

This has been refined such that the courts ask whether an "objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of [religion]." *Wallace*, 472 U.S. 38 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 593 (showing the majority of the Court's implicit adoption of the endorsement test). In short, the endorsement test looks to whether the government has conveyed a message that religion is favored, preferred, or promoted over other beliefs.

In *Pinette*, this Court recognized that "an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring). Any reasonable observer would view monuments on the grounds of the state capital and displays on the courthouse grounds as public property, or at least endorsed by the government owner of the property. The objects' religious character is equally apparent, especially in the context of *Van Orden*. *See Books*, 235 F.3d at 302 ("Th[e] religious format is enhanced, not detracted from, by the etchings at the bottom of the tablet of the Stars of David and the Chi Rho symbol, a distinctive Christian symbol."). It would be unreasonable to believe that the religious items were on the monument without government permission.

B. Surrounding The Ten Commandment Displays With Secular Objects Does Not Neutralize The Religious Impact Of The Ten Commandments, But It Does Convey The Message That Christian And Jewish Religious Messages Have A Community Value Equal To Civic And Patriotic Messages, And That The Government Endorses Those Religious Messages.

In *Books*, a 7th Circuit case dealing with a display that was identical to the one at issue in *Van Orden*, the court rightly rejected the notion that surrounding the Decalogue with secular symbols renders it secular. *See Books*, 235 F.3d 292. Indeed, "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion ... and civil government." *Id.* at 307. The reasoning of the 7th Circuit was endorsed by this Court in its denial of certiorari. *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001) (Stevens, J., statement respecting denial of cert.) (stating that "the reasons why this case is not one that merits certiorari are explained in detail in Judge Ripple's thoughtful opinion for the Court of Appeals.") The displays at issue in *McCreary* and *Van Orden* are similar in that they also are both surrounded with secular symbols.[8] Because of this, it is all the more important to appreciate the likelihood that the reasonable observer will interpret the displays as a State endorsement of religion.

In *Van Orden*, this likelihood is accelerated by the nature of the display as a "monument." Monuments are generally understood to refer to memorials, records, testaments, tributes, reminders, etc., and they are generally erected on public property to honor heroes, soldiers, leaders,

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[8] This similarity is explicitly apparent in the *McCreary* case, where the Decalogue is only one of several items in the display, and expressly relevant in *Van Orden*, because of the secular engravings on the actual monument and the secular items displayed in the vicinity of the monument. *See Van Orden*, 351 F.3d at 180-81 (relying upon the Decalogue's placement on the grounds of a National Historic Landmark among other secular monuments and memorials to show that a reasonable observer would not view the display as an endorsement of religion).

great events, etc. Given the nature of monuments, it is clear that there is a stark difference between artwork being placed in a publicly funded art museum[9] and a copy of the Ten Commandments being placed on the grounds of the state capital or the county courthouse, or in a schoolroom. In *Van Orden* the Ten Commandments monument was placed "on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building … to reflect the role of the Commandments in the making of law." *Van Orden*, 351 F.3d at 181. This placement would further support the reasonable person's conclusion that Texas endorses Judeo-Christian values, just as it would support the conclusion that the placement of any monument in such a prominent location indicates that the State "approved of the display and the full panoply of its religious content." *See Adland v. Russ*, 107 F. Supp. 2d 782, 786 (E.D. Ky. 2000) (finding that an identical monument placed on the capital grounds in Kentucky constituted government endorsement).

Like the monuments in *Books* and *Adland*, the one in *Van Orden* also clearly mingles religious and secular symbols without providing any sort of explanation for the apparent links "between religion … and civil government." *See Books*, 235 F.3d at 307. Because they "utterly fail[ed] to integrate the Ten Commandments with a secular subject matter," the government actors in *McCreary* not only failed to demonstrate a bona fide secular purpose but they also

[9] The District Court in *Van Orden* relied heavily on the facts that the Texas Capital Grounds are designated as a "National Historic Landmark" and the curator of the Capital is a "professional museum curator," in an attempt to analogize the grounds as a museum-type setting as described in *Allegheny*, or the Ten Commandments as a religious painting. Obviously, it is much more likely that a reasonable viewer would perceive government endorsement in the case of a religious monument featured prominently on capital grounds than they would while viewing a work of art in an art museum.

ensured that their Ten Commandments displays would cause a reasonable person to believe that they were witnessing a government endorsement of religion. *See McCreary County II*, 354 F.3d at 453-54.

C. The Fact That The Ten Commandments Were Privately Funded Does Not Render Them Secular Or Neutralize The Government Advancement Of Religion.

The fact that the Ten Commandments Monument in *Van Orden* was not purchased with taxpayer revenue is of no consequence when it comes to the Establishment Clause. *Stone*, 449 U.S. at 42 (holding that the "mere posting of the copies under the auspices of the legislature provides the "official support of the State … Government that the Establishment Clause prohibits." This makes sense, especially because the State of Texas took no steps to keep from endorsing the monument or to try to neutralize its plainly religious effect.

D. Posting The Ten Commandments On Public Grounds Constitutes Government Endorsement Of Certain Religious Sects To The Exclusion Of Religious Minorities And Nontheists.

The first line on the displays, "I AM the Lord Thy God," illustrates both the monotheistic and the sectarian character of the displays. By explicitly asserting the existence of a God, the Decalogue itself endorses theistic sects over nontheistic sects, such as Buddhism, as well as over the beliefs of agnostic and atheistic nontheists. This Court has acknowledged, and should continue to appreciate, the prominent existence of nontheists within the American religious landscape. *See e.g. Lee*, 505 U.S. at 617 (1992)

(Souter, J., concurring). Also, by using the singular "I AM," the Decalogue endorses monotheistic religious sects over polytheistic sects, such as Hinduism. Similarly, by referring to a masculine God over a feminine Goddess, the Decalogue represents a unique conception of the ultimate nature of the Deity that is not shared by all. The posting of the Ten Commandment displays in *McCreary* and *Van Orden* therefore impinge upon the respect for religious pluralism that "is commanded by the Constitution," *Allegheny*, 492 U.S. at 610, and could not be more antithetical to the values embodied in the Establishment Clause. As this Court stated in *Lynch*, "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 688.

E. Public Posting Of Any One Version Of The Ten Commandments Endorses Certain Religious Sects To The Exclusion Of Other Religions That Rely On Materially Different Versions Of The Ten Commandments.

Over twenty years ago this Court stated that the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths and no recitation of a supposed secular purpose can blind [the Court] to that fact." *Stone*, 449 U.S. at 41. This is significant because it acknowledges that the Ten Commandments (and monuments or displays like those at issue in these cases) exist as an object of faith for some people but not for others. However, it is also important not to overlook the discriminatory impact that this form of government endorsement has on "believers." As the lower court in *McCreary* observed, the posting of one version of the Ten Commandments to the exclusion of others causes the

"display to run further afoul of the Establishment Clause because it infringes upon the 'sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *ACLU of Ky. v. Pulaski County, Ky.*, 96 F. Supp. 2d 691, 701, n. 9 (E.D. Ky. 2000) (quoting *Allegheny*, 492 U.S. at 589).

Because "[t]he simultaneous endorsement of Judiasm and Christianity is no less constitutionally infirm than the endorsement of Christianity alone," this Court has "expressly required strict scrutiny of practices suggesting a denominational preference," *Allegheny*, 492 U.S. at 608-09, 614-15 (citing *Larson v. Valente*, 456 U.S. at 246). Both the nature of the Ten Commandments and the actual displays at issue in these cases indicate a denominational preference.[10] For example, in *Van Orden*, the monument on display presents the Protestant (with portions of the Jewish) version over the Catholic version. Additionally, to the extent that any of the Ten Commandments are embodied in the Quran, they are also not accurately represented in the version chosen on the Texas monument. *See The Ten Commandments in the Quran*, www.submission.org/quran/ten.html (last visited Dec. 2, 2004).

In *Stone* this Court rejected efforts to post the Decalogue on classroom walls partly because the first

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[10] The Ten Commandments, as commonly cited, appear twice in the Old Testament: in Exodus 20:1-17 and Deuteronomy 5:1-21. These two versions don't match perfectly. Furthermore, the versions of the "Ten Commandments" as they tend to appear on monuments don't include everything from these verses but tend to be abbreviated, condensed, or paraphrased with parts left out. The decision on which parts to include and which to leave out is necessarily a sectarian (even denominational) religious one; not all Christians, Jews, and Muslims would necessarily agree on the details of such abbreviations, condensations, or paraphrases.

"table" of the Ten Commandments solely concerns the religious duties of monotheistic believers. *Stone*, 449 U.S. at 41-43. However, it is important to acknowledge that even the "uncontroversial" phrases in the Decalogue, such as "Thou Shalt Not Kill," express an unconstitutional denominational preference. As the court in *Harvey v. Cobb County* aptly noted, "[t]hat is not what the text says in the original Hebrew, which says 'Thou shalt not murder.'" 811 F. Supp. 669, 672 (N.D. Ga. 1993), *affd*, 15 F.3d 1097 (11th Cir. 1994), *cert. denied*, 511 U.S. 1129 (1994). This has important theological implications because, by illustration, "Thou shalt not kill" is violated by capital punishment and war. *See e.g.* Owen Weatherly, *The Ten Commandments in Modern Perspective* (1961) at 92, 97.

In this situation, the decision to post one version of the Decalogue over others conveys the message from the State that the Protestant version is "correct" and the Muslim, Jewish, and Catholic versions are "incorrect." It is surely situations like these that were envisioned by the drafters of the First Amendment. And it is exactly for this reason that the government should avoid giving its imprimatur to *any* version of the Ten Commandments. Abrogation of this constitutional limitation could force the courts to have to decide between competing versions of the Ten Commandments, which would most certainly trigger entanglement problems under *Lemon*.

CONCLUSION

The decision of the Sixth Circuit in *McCreary* should be affirmed and the decision of the Fifth Circuit in *Van Orden*

should be reversed because the Ten Commandment displays at issue violate the Establishment Clause.

Respectfully submitted,

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(11)

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, ON BEHALF OF ITSELF, THE AMERICAN JEWISH COMMITTEE, AMERICANS FOR RELIGIOUS LIBERTY, JEWISH COUNCIL ON PUBLIC AFFAIRS, UNION FOR REFORM JUDAISM AND THE CENTRAL CONFERENCE OF AMERICAN RABBIS, IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE

Amici adopts the statement of the Petitioner.

STATEMENT OF FACTS

Amici adopts the statement of the Petitioner.

SUMMARY OF ARGUMENT

1. The arguments of Respondents depend on the assumption that the Ten Commandments on display at Texas' Capitol is non-controversial and non-denominational document, whose function is either to honor the Fraternal Order of Eagles or to mark the Commandments' role as a foundation of American law.

2. The claim that the monument is a tribute to the Eagles is belied by the fact that the monument notes that it was donated by the Eagles to the people of Texas, not the other way around. The claim that the monument celebrates the foundational role of the Commandments is simply false as a matter of history.

3. The court below assumed that it was possible to talk sensibly about the Ten Commandments. It is not. There are multiple versions of the Commandments, multiple translations, and multiple views of whether the Ten Commandments have any special theological significance and what that significance might be.

4. In every case, the monument at issue adopts a view of the Commandments rooted in the Christian tradition, and within that broad tradition, the Protestant tradition:

(a) The text of the Commandments is taken from the Protestant King James Bible;

(b) The enumeration of Commandments is followed by Protestant Christians. The First Commandment is the ban on other Gods. Almost all Jews, however, count "I am the Lord, etc." as the First Commandment. Jewish theologians—but not Christian ones—debate the meaning of that Commandment.

(c) Catholics treat the ban on graphic images as part of the ban on worshipping idols, interpreting that ban as applying only to images which are worshipped as gods, Protestants and Jews view these as separate commandments. That dispute resonated through the Reformation. It is still manifest in the differences between a Baptist church and a Catholic cathedral, or a synagogue and a Russian Orthodox church.

(d) The Sixth (or Fifth) Commandment as translated by Jews bans murder, but Protestants (and Texans) read it as a ban on all killing. That stark difference plays out contemporaneously in debates over capital punishment, abortion and war.

(e) The very fact that the Commandments are singled out for display as a "foundation of American law" reflects a Christian emphasis on the unique and lasting import of the Commandments as law, a view wholly alien to Jews. The monument notably omits the particularistic phrase "who has taken you out of Egypt," a phrase more consistent with a Jewish convenental reading of the Commandments than the universalist one Respondents defend.

(f) Moreover, the Commandments are alien to the religious traditions of American Buddhists, Hindus and Native Americans, to say nothing of atheists.

5. On each of these points, the monument reflects Christian, indeed Protestant Christian, understandings. It is thus a generic, non-denominational statement of "civic religion," but a profoundly sectarian statement.

6. The sectarian statement speaks for itself in the manner of *res ipsa loquitor*. It is an endorsement of one set of religious beliefs over others. The burden should fall on Respondents to explain that the Commandments are not what they appear to be. There are circumstances where they could make that showing, as in an art museum or a textbook, but they have not done so here.

ARGUMENT*

INTRODUCTION

For the first time since *Stone v. Graham*, 449 U.S. 39 (1980), this Court confronts a permanent display by government of an unambiguously religious symbol. The court below found this display constitutional. *Amici* believe that *Stone* is controlling. Here, as there, the purpose and effect of the display was to urge reverence for, and compliance with, the Ten Commandments.

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* Pursuant to Rule 26.1, the undersigned certifies that no one other than the *amicus* and their counsel, participated in the drafting of this brief, nor did any other person help pay for its production or filing.

A state itself may not engage in religious speech, as Texas has done here. *Widmar v. Vincent*, 454 U.S. 263, 271, n. 9 (1981); *Good News Club v. Milford Central School District*, 533 U.S. 98, 114 (2001). These Ten Commandments are owned by the State of Texas, displayed at its Capitol, and speak with its voice.

Texas can argue only that (1) *Stone* should be overruled because Commandments displays are not perceived as inherently religious; (2) the way the Commandments are displayed dispels any governmental endorsement; (3) the constitutional offense is *de minimis*; or (4) the Commandments, like the legislative prayers in *Marsh v. Chambers*, 463 U.S. 783 (1983), benefit from an exception to general Establishment Clause rules.

Accepting the first argument means both denying the obvious and converting to public, secular use a statement of core religious commitments. The second defense, that Texas has carried its burden of dispelling the natural inference that arises from the Commandments' display, is not persuasive here. See Point III, *infra*. The third, the *de minimis* defense, has never been accepted by this Court, as Justice O'Connor pointedly observed in her concurrence in judgment in *Elk Grove U.S.D. v. Newdow*, 542 U.S. ___, ___ (2004) and will not be treated further. The Commandments are not credibly treated as possessing only *de minimis* religious significance. The *Marsh* "historical practice" exception also cannot save Respondents' display, as we demonstrate in the next section.

I. THE TEN COMMANDMENTS DO NOT QUALIFY FOR AN "HISTORIC EXCEPTION"

A. Ten Commandments Displays Do Not Have A Long Pedigree

The display of the Commandments cannot be saved by reference to an "unambiguous and unbroken" history of long-standing usage, *Marsh v. Chambers*, *supra*, 463 U.S. at 792 and *Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970).

Officially sanctioned and permanent displays of the Ten Commandments on public property are a relatively recent addition to the official American landscape. Anson Phelps Stokes' magisterial survey of the intersection of religion and law, Church and State in the United States (1950), makes no mention of such displays, other than passing references to a North Dakota statute requiring the posting of the Commandments in public school classrooms. That remained the situation when Stokes' work was abridged and updated several years later, A.P. Stokes and L. Pfeffer, Church and State in the United States (1954). Pfeffer's own comprehensive volume, Church, State and Freedom (2d edition, 1967), likewise said little about Ten Commandments displays.

Professor Phillip Hamburger's recent wide-ranging survey of nineteenth century church-state controversies, P. Hamburger, Separation of Church and State (2002), rejects the doctrine of "strict separation." Although reporting on earlier debates and controversies anticipating current ones, it says nothing of official Ten Commandments displays.

With but three exceptions—two from Pennsylvania in which the Third Circuit[1] dealt with Ten Commandments displays dating to the early 1920's, and one in which the Eleventh Circuit[2] confronted an official seal dating to 1872, (displaying tablets on which no text was engraved), the reported cases deal with monuments erected no earlier than the 1950's. Many of the reported cases involve contemporaneous efforts whose religious purposes are at best ill disguised. *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003). By contrast, legislative prayers were a tradition in Congress from the founding, *id.*, 787-88; and for equally long periods in most state legislatures, *id.* at 789, n. 11.

B. The Display Of The Commandments Have Engendered Significant Controversy

It also cannot be said, as it was in *Marsh*, and as it might be said of the phrase "under God" in the Pledge of Allegiance, that the practice of displaying the Ten Commandments is an "unbroken [one] ... which has been employed pervasively without engendering significant controversy," *Newdow*, *supra*, 542 U.S. at ___ (O'Connor, J., concurring in judgment), citing *Walz v. Tax Comm'n*, *supra*, 397 U.S. at 698.

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[1] *Modrovich v. Allegheny County*, 385 F.3d 397 (3rd Cir. 2004); *Freethought Society v. Chester County*, 334 F.3d 247 (3rd Cir. 2004).

[2] *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

In *Newdow*, Justice O'Connor noted that a fifty-year period of "quiet and general acceptance" of civic use was not "inconsiderable." These displays have not, however, enjoyed "quiet and general" acceptance.

The phrase "under God" in the Pledge of Allegiance had been recited daily in tens of thousands of public schools and by millions of children and adults. Ten Commandments displays have been under legal assault since *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973); *Ring v. Grand Forks* (1980) and *Stone v. Graham* (1981). Respondents acknowledged the scope of the controversy in urging that this Court grant certiorari.

The period in which such displays were accepted without challenge is thus less than half the 50 years in *Newdow*. The accompanying controversy is also more prolonged and more intense than the controversy surrounding the Pledge. It has even generated demands for display of competing messages. *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Unsuccessful legislative efforts to overturn decisions barring official Commandments displays have persisted.[3]

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[3] See, e.g., just in Congress, H. Con. Res. 51 (105th Cong. 1st Sess. 1997) (criticizing *Glassroth v. Moore*); H.R. 4922, First Amendment Restoration Act (107th Cong. 2nd Sess.) (criticizing *Stone* and *Ring*, and stripping federal courts of jurisdiction); H.R. 3895 (107th Cong. 2nd Sess.) (display of Ten Commandments within reserved power of states); H.R. 2045 (108th Cong., 1st Sess.) (same); H.R. 3190 (108th Cong., 1st Sess. 2003) (same); S.1558 (108th Cong., 1st Sess. 2003) (same); H. J. Res. 46 (108th Cong., 1st Sess. 2003) (constitutional amendment to permit, *inter alia*, display of Ten Commandments); H.J. Res. 297 (101st Cong.

II. THE TEN COMMANDMENTS ARE INTENSELY RELIGIOUS—AND RELIGIOUSLY CONTESTED

The court below invoked a potpourri of reasons to disregard the ineluctably religious nature of the Commandments. It (1) ignored the religious import of the first four Commandments, which are, as this Court has held, *Stone*, *supra*, and as anyone can see, ineluctably religious. "The Commandments do not confine themselves to arguably secular matters.... Rather, the first part of the Commandments concern the religious duties of believers," *Stone v. Graham*, *supra*, 449 U.S. at 41-42; *City of Elkhart v. Book*, 532 U.S. 1058 (2001) (Stevens, J., concurring in denial of certiorari); *cf. Murrow Indian Orphans Home v. Childers*, 197 Okla. 249, 258, 171 P.2d 601 (1946); (2) failed to acknowledge the dispositive difference between a temporary Christmas display celebrating a holiday with mixed religious and secular components *Lynch v. Donelly*, *supra*, and a permanent, freestanding religious one, *County of Allegheny v. ACLU*, 492 U.S. 573, 606-07 (Blackmun, J.) (1989); *id.* at 629 (O'Connor, J.); *id.* at 661, 664-65 (Kennedy, J.); (3) conjured up a right to government endorsement of some forms of religion lest government be perceived as hostile to religion, 351 F.3d at 178-181, a claim

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1st Sess. 1989) (constitutional amendment); H. Con. Res. 31 (105th Cong., 1st Sess. 1997) (resolution adopted urging right to display of Ten Commandments); H.R. 1501, amendment 200 (106th Cong. 2d Sess.) (declaring display of Ten Commandments reserved power of states; amendment passes 248-180) . None of the substantive proposals were enacted into positive law, although several resolutions on the subject were adopted.

repeatedly rejected by this Court, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 271, n. 9 (1980); and *School Dist. of Abington Twshp. v. Schempp*, 374 U.S. 203, 225-26 (1963); and (4) referenced, without supporting citation, the Commandments' supposed contribution to American law.

A. There Is No Merit To The Claim That The Commandments Are The Foundation Of American Law

Without any citation of legal or historical authority, the Fifth Circuit claimed that the Commandments are the foundation of American law, 351 F.3d at 181. See also, *City of Elkhart v. Book*, *supra*, 532 U.S. at 1059, 1063 (Rehnquist, C.J., dissenting from denial of certiorari). A careful study has demonstrated that claim to be greatly exaggerated. S. Greene, The Font Of Everything Just And Right: The Ten Commandments As A Source Of American Law, 14 J.L. REL. 525 (1999-2000).

A computerized search of state and federal decisional law discloses that there are rhetorical references to the Ten Commandments in judicial opinions. Only rarely did a case turn in any serious way on the substance of the Commandments. There were nineteenth century cases upholding Sunday Blue Laws on the ground that the Ten Commandments commanded a day of rest, see *ACLU v. Ashbrook*, 375 F.3d 484, 507 (6th Cir. 2004) (Batchelder, J., dissenting) (collecting cases), but those holdings were discredited by this Court's Sunday Blue Law cases, *McGowan v. Maryland*, 366 U.S. 420 (1960), and earlier decisions, *e.g.*, *Komen v. City of St. Louis*, 316

Mo. 9, 18, 289 SW 838 (1926); Borden, Jews, Turks and Infidels (1984).

B. The Commandments Have None Of The Attributes Of Civic Deism

In evaluating whether Texas' permanent display of the Ten Commandments communicates a religious message, the place to begin is with the obvious. The Commandments are not a marginal or generic religious symbol, such as might fall under the rubric of ceremonial deism, devoid of intense and particularistic religious meaning. *Elk Grove*, *supra*, 542 U.S. at ___ (O'Connor, J., concurring in judgment); *Marsh v. Chambers*, *supra*, 463 U.S. at 810-11 (Brennan, J., dissenting).

The religious references upheld under the rubric of ceremonial deism, as Justice O'Connor has emphasized, "possess[], and transmit[]" more "a civic than religious" meaning. *Elk Grove*, *supra*, 542 U.S. at ___. The Fifth Circuit understandably did not attempt to shoehorn the Commandments into this shoe that does not fit.

The legislative prayers upheld in *Marsh v. Chambers* made no reference to any specific faith, a fact crucial to their constitutionality, *ACLU v. County of Allegheny*, *supra*, 492 U.S. at 602-03. ["H]owever history may affect the constitutionality of nonsectarian references to religion ... history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." Cf., *Larsen v. Valente*, 456 U.S. 228 (1982) (most basic principle of Establishment Clause is inter-faith neutrality). The same generic quality is evident in "In God We Trust"

or "One Nation under God." It is not true of the Ten Commandments.

(i) The Commandments as a unit, and some of them individually (the Jewish first four), are not generic religious references. They are intensely sectarian statements, amounting to a binding dogmatic statement of faith and morals. The validity and meaning of these commands divide religious groups (using that term broadly to include those who reject divinely inspired ethical rules), see, *infra*, Point II (B)(ii) and (iii).

(ii) The Commandments retain a central place in the religious traditions which accept them. Civic pieties play little role in institutionalized religion.

(iii) The effect of placing the Commandments on public display was, and is not, to acknowledge their place in shaping American law. It is, rather, to communicate the State's desire that its citizens accept the "moral code" embodied in the Commandments. It is therefore a form of forbidden, albeit passive, proselytizing, and of "prescrib[ing] what shall be orthodox in religion...." *Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943).

(i) The Commandments Are Intensely Sectarian Statements

Discussion of the religious nature of the Commandments is superfluous. This Court held it to be so in *Stone*. For argument sake, though, we write as if *Stone* had not been decided.

The Ten Commandments are according to the twin biblical accounts, Exodus 20:2 and Deuteronomy 5:6, not minor elements of a larger religious code.

They are the public expression of a theophany with Moses and the people he led, Exodus 19 and Deuteronomy 5, in which God enters into a covenant with that people. *Cf.*, Exodus 24:7; W.G. Plaut, The Torah: A Modern Commentary To Exodus at 220 (1983) ("The Ten Commandments are rooted in the covenant relationship").

To this day, the Ten Commandments as they appear in Exodus 20, together with the prelude in Exodus, chapter 19, which places the Commandments in the context of a religious experience, are read in synagogues on the Feast of Pentecost, a holiday which traditionally commemorates the theophany at Sinai. In many, but not all, synagogues, the Commandments are also displayed over the Ark holding the Torah scrolls.[4]

Jewish authorities beginning no later than Nachmanides, a well known Spanish exegete of the 13th century regard the Commandments as the text of the Covenant with Israel. Modern scholars agree. "This is not a code of detailed laws. This is a formulation of … conditions required for membership in the community." M. Weinfeld, *The Uniqueness of the Decalogue* in B.Z. Siegel, The Ten Commandments In History And Tradition, at 9 (1990) (hereafter "Siegel, Ten Commandments").

The Catholic tradition, by contrast, accords the Commandments special pride of place as the word of

[4] There is no evidence of the Ten Commandments in synagogues of antiquity. "Up to the end of the Middle Ages, Jews did not use the Tablets as a symbol and did not even depict them in drawings." G.B. Sarfati, *The Tablets As A Symbol Of Judaism* in B.Z. Siegel, The Ten Commandments In History And Tradition (1990) 383-85.

God itself, untainted by transmission through human hands—*i.e.* Moses. At least since the Council of Trent, the Decalogue has been one of the pillars of catechesis. "The Decalogue contains a privileged expression of the natural law." (Catechism, ¶ 2070).

John Calvin likewise described them as "the true and eternal rule of righteousness for all who wish to conform their lives to God's will." J.W. Farley, John Calvin's Sermons on The Ten Commandments at 24 (1980), citing Calvin's Institutes ("Calvin, Sermons"). As Calvin further explained (*id.* at 240):

> All we have to do is count our fingers and we have the commandments of God, we have the sum of what we ought to remember in order to be God's good pupils.

The Jewish tradition accords the Ten Commandments no greater significance than any other commandment. G. Sarfati, *The Tablets As A Symbol Of Judaism*, in Siegel, Ten Commandments, *supra* at 383-385. A noted scholar of the Jewish roots of Christianity has observed, "[f]rom the time of the earliest Fathers of the Church, Christianty assigned an even more exalted position to the Decalogue than Judaism did." D. Flusser, *The Ten Commandments and the New Testament*, in Siegel, Ten Commandments, *supra*, at 219.

The Ten Commandments are not now a regular part of Jewish liturgy. They were recited daily in the Second Temple. Mishna Tamid 5:1. The rabbis decided against replicating that practice outside the Temple. The Talmud explains that "heretics"—a reference to early Christians, M. Greenberg, *The*

Tradition Critically Examined, in Siegel, Ten Commandments, *supra*, at 117-19—emphasized their importance as an exclusive statement of man's obligations to God.

This concern exactly captures early Christian understandings of the Commandments as the residuum of the law. See Hasdai Crescas (c. 1340-1410). The Refutation of Christian Principles, (D.J. Lasker, ed.) 26, 74-75 (1992). See Calvin, Sermons, *supra*, at 249. Matthew 19: 16-20 ascribes to Jesus a citation of the Commandments in truncated form, with the addition of the command of Leviticus 19 to love one's neighbor—and the omission of the Commandments *Stone* denominated "religious." *Stone v. Graham*, *supra*. See, G. Easterbrook, *Let's Display The Six Commandments*, www.tnr.com/easterbrook.mhtml?pid=927 (11.04.02).

The Protestant tradition particularly emphasized the central importance of the Ten Commandments. In Reformed Protestant churches, images of saints were replaced with "often exuberantly, floridly framed Biblical texts, plus big boards bearing the three that all Protestants should know by heart: Nicene or Apostle's Creed; the Ten Commandments; and the Lord's Prayer." D. MacCulloch, The Reformation: A History (2004) at 541 (hereinafter "Reformation: A History"). Queen Elizabeth in 1561 directed that the Commandments be posted on walls of the English churches for the religious edification of her subjects. J. Phillips, The Reformation Of Images: Destruction Of Art In England (1973) 129, 136.

(ii) Displaying The Ten Commandments Expresses An Unacceptable Preference For Judeo-Christian Faiths

Respondents' monument represents the faith statement of one group of faiths, but not others. It has been said that the Koran (Quran) accepts all of the Commandments in substance, see I.A. Arshed, *Islam Supports Bible's Ten Commandments*, www.islam101.com/religion/TenCommandments/tcQuran.htm. However, it does not treat them as a unit of special theological significance, and it omits the opening phrase (or Commandment ("I am the Lord … who took you out of Egypt."[5]) (Emphasis added.)

The Commandments are also not part of faiths new to Americans—Hinduism, Buddhism, Shintuism, Confucianism and yet others. These traditions which once may have been demographically insignificant, but which are today a growing part of the American religious mosaic, could not accept a prohibition on either graven images or idols. They are not monotheistic, a criterion accepted by all Judeo-Christian interpretations of the Commandments. Likewise, the Commandments are not part of the original faith of Native Americans.

If the Ten Commandments displays truly represent the foundation of American law, not only as

---

[5] The reference to the Exodus as a reason for observing the Sabbath is also omitted from the command on the Sabbath. Koran 4:154. Arshed suggests that the Koran denies that, as the Bible has it, God "rested" on the seventh day. Koran 2:255. The Koran also rejects the Bible's insistence that God visits the sins fathers on the third or fourth generation. Koran 6:160.

it once was, but as it is—and nothing on the displays suggests a purely historical focus—then the message the displays sends the reasonable observer is that citizens who do not accept a ban on idolatry or graven images are not Americans true to the origins and foundational beliefs of the society. The necessary and inescapable conclusion is that they are outsiders whose faiths are officially disfavored.[6]

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[6] Former Alabama Chief Justice Roy Moore displayed a Ten Commandments monument in the Alabama Supreme Court to reject Buddhism and Hinduism. *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1313 (M.D. Ala. 2002), affirmed, 325 F.3d 1283 (11th Cir. 2003). *Cf.*, *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004) (rejecting claim that removal of Ten Commandments would establish non-Judeo-Christian faiths).

See also an interview of Rev. James Dobson by Larry King, September 5, 2003:

> KING: If the chief judge of a court were Muslim, and put up a Muslim creed, would that be OK with you?
>
> DOBSON: It would not be OK with me …
>
> KING: Why not?
>
> DOBSON: Because that's not true—that's not the historic foundation of our country.
>
> KING: So you're saying we're a Judeo-Christian country? What right then do non Judeo-Christians have? Don't they have the same rights as you?
>
> DOBSON: The beautiful thing, Larry, about the Judeo-Christian system of values is that it provides freedom. Freedom to worship however you want to or freedom not to worship at all. If the Islamic law were the law of this land, there would not be that freedom. And if you don't believe that, look at the countries where Islamic law rules.
>
> http://transcripts.cnn.com/Transcripts/0309/05/lkl.00.html

Any emphasis on the Judeo-Christian tradition also excludes the growing group of American "seculars," including atheists, now about a tenth of the population. Fourth National Survey of Religion and Politics, University of Akron (2004). For these citizens, human reason, not revelation or divine inspiration, is the source of morals and political choices. Many of them believe it dangerous to think otherwise. See, S. Jacoby, Freethinkers: A History of American Secularism (2004).

The message of exclusion sent by the monument may not have been obvious when it was erected. The recognition that the United States was not a (Protestant) Christian country, but a Judeo-Christian one was in the 1950's a marked step in the direction of religious toleration. W. Herberg, Protestant, Catholic, Jew; An Essay in American Religious Sociology (1988).

As the society as a whole grows more religiously diverse, and, it must be said, secular, the import of the display becomes correspondingly more substantial. A practice sectarian in origin can become secularized over time, see, *e.g.*, *McGowan v. Marlyand*, 366 U.S 420, 477, 503-05 (1961) (Sunday Blue Laws). By a parity of reasoning, a thing that was once secular can take on a sectarian hue by changed circumstances.

In the 1950's, given the more profound endorsements of Judeo-Christianity by government, a Ten Commandments display might not have signaled that some citizens were preferred and others disfavored, *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 595-97. Today, that is not the case. It is

precisely the urgent need to signal just that message that fuels the contemporaneous explosion in Commandments monuments. See, *e.g.*, n. 10, *supra*.

(iii) The Theological Disputes Over The Commandments Are Not Limited To General Questions Of Their Authority Or Role

Even faiths which accept the Commandments disagree in important ways over their translation from the original Hebrew. These are not obscure debates of theologians of the "how many angels can dance on the head of a pin" variety. Respondents consistently chose one version, reflecting one theological point of view.

The attached chart (Appendix A) summarizes the differences between faiths in listing and interpreting the Commandments. (That chart varies slightly from the text used on the monument because it is based on a different text of the Bible.)[7]

The Bible itself refers to ten "words," Exodus 34:28, Deuteronomy 4:13, not ten "commandments." The Hebrew text contains no punctuation or enumeration aids (*i.e.*, numbering). There are possible readings of the text which have more than ten Commandments. See M. Breuer, *Dividing the Decalogue into Verses and Commandments*, in Siegel, Ten Commandments, *supra*, at 291-330. How the Ten Commandments pericope is broken up into ten is thus dependent on what philogical, grammatical, and religious assumptions the reader makes.

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[7] The Washington Post printed a slightly different summary (October 23, 2004, B-9).

a. The First Commandment

On Texas' monument, the First Commandment is "Thou shall have no other gods before me." This is, as the chart shows, currently the uniform Christian view. It is not the view of traditional Judaism, at least since Talmudic times. See, *e.g.*, J.C. Holbert, The Ten Commandments - The Great Texts: A Preaching Commentary (2003). However, as the table shows, the early Jewish writers on the Bible, Philo and Josephus, presaged the current Christian view.

A recent translation of the Torah for use in Conservative Jewish congregations follows the usage of Philo and Josephus, Etz Hayim, p. 1017 (2001), but a recent Reform Jewish translation follows the traditional (and still Orthodox) Jewish view that the ban on idols and graven images is the Second Commandment. Christians, too, have long understood "I am" as the First Commandment for Jews. See D. MacCulloch, Reformation: A History, *supra*.

The underlying theological point—whether God has commanded belief in Himself—has generated voluminous literature. See W.J. Harrelson, The Ten Commandments And Human Rights (1997). Medieval Jewish commentators divided on the meaning of the command to believe in God. Was it an obligation to contemplate God philosophically (Maimonides), or to believe in divine intervention in human affairs ("who took you out of Egypt")? Or perhaps the phrase means, as philosopher Nathan Rotenstreich proposes, that man is "called" by God. N. Rotenstreich, *The Decalogue And Man As "Homo Vacatus,"* in Siegel, Ten Commandments, *supra* at 247-48.

Those who do not count "I am" as a commandment argue that the phrase is merely identifying the commanding authority. It is so written on the monument. That display thus sweeps away much of the Jewish tradition in favor of the Christian tradition. What else should the reasonable observer think but that the State has in this respect a preferred form of Judeo-Christianity, with a heavy emphasis on the latter?

Respondents' official text omits the phrase "who took you out of the land of Egypt from the house of slavery." That phrase suggests that the Commandments were directed to a specific people who shared a specific historical experience of suffering and oppression, and of redemption as a people at God's hand. This description of the divine giver of the Commandments would deny the universal covenantal import of the Commandments as a covenant. See J.T. Noonan & E.M. Gaffney, History, Cases and Other Materials on The Interaction of Religion and Government, pp. 6-7 (2000) (collecting sources); Rotenstreich, *The Decalogue And Man As "Homo Vacatus,"* in Siegel, Ten Commandments, *supra*.

Early Protestants were quick to note the covenantal quality of the Commandments. But for them, it was a covenant between God and all of humanity. Reformation: A History, *supra*, at 173. Given the generally (Protestant) Christian form of the displayed Commandments, it is not surprising that the monument would omit language undermining the belief that the Commandments have universal import.

(b) The Jewish Second Commandment - Prohibition Of Graven Images

As reproduced in the challenged monument, the Second Commandment is "Thou shalt not make to thyself any graven images." Catholic Bibles, however, do not list this as a separate Commandment. In those texts the prohibition on images is treated only as an aspect of the (Church's) First Commandment, a prohibition on serving other gods, including images which are worshipped as separate divinities.

On the Catholic understanding, this Commandment does not forbid the making or possession of images of the true God. Protestants and Jews, while disagreeing on the exact form of the Commandment, understand the prohibitions it contains as prohibiting a display of images of the Divine or other subjects of worship (*i.e.*, angels) and, perhaps, all images. These views surface in religious liberty litigation. See *Jensen v. Quaring*, 728 F.2d 1121 (8th Cir. 1984), affirmed by an equally divided court, 472 U.S. 478 (1985); *Bureau of Motor Vehicles v. Pentecostal House of Prayer*, 269 Ind. 361, 38 N.E.2d 1225 (1978) (religious objections to photographs on drivers' licenses).

The division of the Commandments in the form used here closely follows the Protestant-Reformed tradition. That interpretation forms "part of [the] violent [Protestant] polemic against what they thought [were] the idolatries of Roman Catholicism." R.H. Charles, The Decalogue (1923) at 76-88. Counting the ban on graven images as a separate Commandment "gave the condemnation of graven images extra

importance .... [I]t was also easy for the reformers to seize on this [Catholic grouping of the Commandments as another example of the dishonesty of the Pope's church." Reformation: A History, *supra*, at 141-42; 252-53. Holbert, *supra*, at 25; J. Phillips, Reformation Of Images, *supra*, at 85, 104-05.

The debate over the incarnation of God in the person of Jesus—which divides Jews from Christians, and Christians from other Christians—depends on this question. So does the question of whether images of God in the person of Jesus or angels are appropriate decorations for a church or proper subjects of devotion. These questions played an important role in the Reformation. See Reformation: A History, *supra*, 539-42. Echoes of these disputes continue to reverberate. They are readily visible by comparing the plain interior of a synagogue or Baptist church with the decorated walls of a Catholic or Russian Orthodox cathedral.

(c) The Sixth Commandment

Jews understand the Sixth (on the count of Lutherans or Catholics, the Fifth[8]) Commandment as prohibiting only murder, G. Blidstein, *Capital Punishment: The Classic Jewish Discussion*, 14 Judaism 159 (1965), not all killings, as the Reformed Protestant King James version, and therefore Texas' monument, has it.

This dispute over translation is of more than passing interest in a country riven with debates over

[8] See *Knapp v. Leonardo*, 46 F.3d 170, 181, n. 1 (2d Cir. 1995) (Oakes, J., dissenting) (noting differences in numeration with regard to this Commandment).

war,[9] abortion and capital punishment. Pacifistic Christian traditions have long pointed to the "not kill" version in support of their pacifism. Reformation: A History, *supra*, at 144 (followers of Ulrich Zwingli in Zurich refused to join army because of this Commandment).

In capital cases defendants' counsel argue that the Ten Commandments' ban encompasses even state sanctioned killings. Prosecutors meet that argument by insisting that the Commandment prohibits only illegal killings—capital punishment not included.[10] These usages, as well as invocations of the Commandment to abortion, have likewise found their way into popular media. See, e.g., *Thou Shall Not Murder* (2004) at www.patrobertson. com/teaching /shallnotmurder.asp

III. RES IPSA LOQUITOR TYPE ANALYSIS IS AN APPROPRIATE METHOD OF DECIDING RELIGIOUS SYMBOL CASES

A. The Ten Commandments Speak For Themselves

Speaking in a negligence case, *Sweeney v. Irving*, 228 U.S. 233, 238-39 (1913), this Court wrote of the doctrine of *res ipsa loquitor*—"the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way the thing

[9] See, e.g., *Talk of the Nation*, November 11, 2004, www.nexis.com.research/search/documentDisplay/m=e84777419e254flsef92288 (discussing compatibility of war and "Thou Shall Not Kill").

[10] See, e.g., *State v. Hasidlen*, 357 N.C.1, 21-24, 577 S.E.2d 594 (2003); *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996); *Bracy v. Gramley*, 81 F.3d 1558, 1576, n. 25 (4th Cir. 1989) (Murnahagn, J., dissenting) .

happened, it may fairly be found to have been occasioned by negligence." A permanent display of the Ten Commandments is a thing that speaks for itself, no less than a patient having surgical tools left inside the body after surgery "speaks for itself" of negligence. The rule that the thing speaks for itself is not just a technical rule. It is the embodiment of the common sense insight that some things are as they appear.

Texas' Ten Commandments monument is what it appears to be—a symbol that conveys central ideas of Judeo-Christian religion. It proclaims that God reveals Himself to humans, that he demands exclusive obedience and loyalty, and that He commands certain types of religious and ethical behavior and that there is no discontinuity between the religious and ethical.

B. Texas Has Not Shown That Its Display Is Not What It Appears To Be

Things are not always what they appear to be. Government owned Ten Commandments will not in all circumstances convey a message of official religious preference (and a concomitant message of exclusion). *Lynch*, *supra*. Surrounding circumstances may demonstrate that an object is not the religious statement it appears to be. This demonstration is in the nature of an affirmative defense. The burden of proving the existence and efficacy of secularizing circumstances ought to be on the party asserting them.

The Commandments could constitutionally be displayed in an art museum. There, a displayed object may be religious in origin—an altar triptych, a Madonna and child, or a depiction of the Ten

Commandments—but the government's interest is only its aesthetic value, not its religious import. In a museum, the surroundings, institution's name, the accompanying graphics and the conduct and dress of the visitors, are not those accompanying religious activity. That context unambiguously telegraphs a secular message. The court below properly did not credit Respondents' argument that state capitol grounds functioned as a museum, 351 F.3d at 181.

The text of the Commandments could also constitutionally be displayed in a public school text. There, the context would be constitutionally permissible teaching about religion. *Edwards v. Aguillard*, 482 U.S. 578, 606-07 (1987) (Powell, J., concurring); *Stone*, *supra*.

Then there is the now fabled frieze on the walls of this courthouse—depicting a wide range of lawgivers—including Moses holding the Ten Commandments. But, as Justice Stevens, concurring in part in *County of Allegheny*, *supra*, explained:

> Placement of secular figures alongside these three religious leaders ... signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian renaissance masters from a public museum.

492 U.S. at 652.

Applying the commonsense principle that "the thing speaks for itself" has several advantages over *ad hoc* judicial evaluations. It provides a base rule for

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deciding Ten Commandments cases, and avoids the attendant uncertainty and expense of starting each case from scratch. Likewise, it will discourage the unedifying spectacle of government entities scrambling to create, *ex nihilo*, incredible secular explanations and interpretations.

C. A *Res Ipsa Loquitor* Type Rule Accurately Assesses Religious Purpose And Primary Effect

The "thing is what it is" analysis fits easily within the Establishment Clause analysis that the Court has embraced. The Court inquires into the legitimacy of the government's purposes and, regardless of the government's purposes, an assessment of a practice's effect. *Zelman-Harris v. Simmons*, 536 U.S. 639, (2002); *Pinette*, *supra*; *County of Allegheny*, *supra*; *Wallace v. Jaffree*, *supra*. The nature of these inquiries is discussed in Petitioner's briefs. We do not belabor the details.

(i) The Purpose Asserted Of Honoring The Eagles Are A Sham

If the thing speaks for itself, an intensely religious object inevitably and unavoidably speaks a religious message. The law assumes that people intend the natural consequences of their acts. That presumption is applicable to constitutional claims. *Reno v. Bossier Parish School Bd.*, 520, U.S. 471, 487 (1997); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

Aside from the purpose of demonstrating the foundation of American law, a purpose we have demonstrated cannot sustain the monument,

Respondents urged that the monument honors the Eagles. The gap between the additional asserted purpose of honoring the Eagles for their youth work and the religious means chosen to carry it out (a Ten Commandments display in which there is no mention of that youth work) is so wide as to defeat any connection between the asserted purpose and the monument. This is independent of the substantial claim that where religious means are invoked to serve a secular end, and a secular means would do as well, the choice of religious means is indicative of a religious purpose.

Moreover, the monument bears the inscription "presented to the People" of Texas by the Eagles, not by the people of Texas to the Eagles, as would be expected if the Eagles were being honored. The observer of the monument would see that dedication, not an obscure, legislative resolution honoring the Eagles which contradicts the monument itself.

(ii) The Effect Of Respondents' Display Is To Endorse Religion

The Establishment Clause prohibits actions that have the "effect" of 'endorsing' religion, as well as advancing it in more material ways, *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 592; *Santa Fe ISD v. Doe*, 530 U.S. 290, 308 (2000). The question to be asked is "whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as state endorsement of religion." *Santa Fe*, *id.*, 530 U.S. at 308, citing *Wallace v. Jaffree*, *supra*, 472 U.S. at 73, 76 (O'Connor, J., concurring).

"The Establishment Clause forbids a State to hide behind the application of facially neutral criteria and remain studiously oblivious to the effects of its action." *Santa Fe, supra*, 530 U.S. at 307, n. 21.

One of the important debates in American society is between those who seek a polity informed to one degree or another with religious values—and insist that this is the nation's historical tradition—and those who seek a wholly secular polity—and insist that this is the system the Founders' established. The Ten Commandments displayed at Texas' Capitol effectively places a heavy thumb on the scales on one side of that debate. Respondents' display tells citizens what values are prescribed and by Whom.

That message favors one set of religious values (those of the Judeo-Christianity) and, within that broad set, a subset of (Protestant) Christian values. It is not religiously neutral. It is no coincidence that Texas, both currently and when the monument was first accepted, was predominantly Protestant and that the monument reflects that Protestant perspective.

IV. REMOVING THE TEN COMMANDMENTS WOULD NOT ENDORSE SECULARISM

The Fifth Circuit reasoned that "[t]here is no constitutional right to be free of government endorsement of its own laws." 351 F.3d at 182. Whether or not one accepts the divine origin of the Commandments, it held they are "sacred texts to many, [but also] a powerful teacher of ethics, of wise counsel urging a regiment of just governance among free people." This is elegant gibberish.

Some of the rules in the Commandments cannot be Texas' "own laws," which it may endorse. It cannot prohibit idolatry, *Employment Division v. Smith*, 494 U.S. 872, 877-78 (1990); or blasphemy, or taking God's name in vain, *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 530-33 (1952), *City of Bellvue v. Lorang*, 140 Wn.2d 19, 922 P.2d 496 (1999), *State v. John W.*, 418 A.2d 1097 (Me. 1980), overruling *State v. Mockos*, 120 Me. 84, 113 A.39 1921), see H. Kalven, A Worthy Tradition: Freedom of Speech In America, 11-13 (1988); or even Sabbath breaking, *McGowan, supra*.

This error was compounded by insistence of the court below that removing the Commandments would amount to a heckler's veto in the hands of those critical of religion. It attacked the straw man of "ruthless separation" of church and state," 351 F.3d at 178. The opinion quoted in support Justice Kennedy's dissent (without noting that it was a dissent) in *County of Allegheny*, and Justice Goldberg's warning in an opinion concurring in a judgment banning Bible reading in the schools, that "government must inevitably take cognizance of religion, *School District of Abington Twshp. v. Schempp, supra*, 374 U.S. at 306. Of course, if the monument was secular as Respondents insist, even "ruthless separation" would not bar its display.

Even leaving aside the fact that one is taken from a dissent, these snippets do not provide a basis for upholding the judgment below. Incendiary phrases like "ruthless separation" are no substitute for analysis of facts and circumstances.

Justice Goldberg for his part demanded that courts distinguish between "mere shadow" and real substance. That is not to relegate practices short of the Inquisition to the shadows. The unvarnished reading of the Lord's Prayer or another excerpt of the student's choosing (such as the Ten Commandments) from a Bible would violated the Establishment Clause according to Justice Goldberg.

The heckler's veto argument is one this Court has repeatedly rejected. *School District of Abington Twshp. v. Schempp*, *supra*, 374 U.S. at 225-26 (footnotes and citations omitted). Accord, *Santa Fe*, *supra*, 530 U.S. at 312.

The Fifth Circuit did not in the end deny that the Commandments are religious; it did not deny that their presence on capitol grounds communicated a religious message (although somewhat inconsistently sought to downplay the significance of that message). It insisted instead, that if government religious speech were banned, the Constitution would be hostile to religion. That might be a reasonable conclusion in some other constitutional system. Not in ours.

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully Submitted,

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December 13, 2004

ALTERNATIVE NUMBERINGS OF THE TEN COMMANDMENTS* IN DIFFERING FAITHS

Jewish	Augustine	Lutheran and Roman Catholic	The Ten Commandments in Abbreviated Form (Exodus 20:2-17, RSV) (Chap. 20: verse __)		Reformed Christian	Orthodox Christian
1	--	--	2.	I am the Lord your God, who brought you out of the land of Egypt, etc.	--	--
2	1	1	3.	You shall have no other gods before me	1	1
2	1	(omitted or included in 1)	4-6.	You shall not make for yourself a graven image, or any likeness of anything, etc.	2	2
3	2	2	7.	You shall take the name of the Lord your God in vain, etc.	3	3
4	3	3	8-11.	Remember the Sabbath day, to keep it holy. Six days you shall labor, etc.	4	4
5	4	4	12.	Honor your father and mother, that your days may belong, etc.	5	5
6	5	5	13.	You shall not kill.	6	6
7	6	6	14.	You shall not commit adultery.	7	7
8	7	7	15.	You shall not steal.	8	8

* This chart is adopted from W. Harrelson, The Ten Commandments and Human Rights (Fortress Press, 1980), at 49.

Jewish	Augustine	Lutheran and Roman Catholic	The Ten Commandments in Abbreviated Form (Exodus 20:2-17, RSV) (Chap. 20: verse __)		Reformed Christian	Orthodox Christian
9	8	8	16.	You shall not bear false witness against your neighbor.	9	9
10	9 (wife)	9	17(a).	You shall not covet your neighbor's house, etc.	10	10
10	10 (rest of Deut. 5:21	10	17(b).	You shall not covet your neighbor's wife, or his manservant, etc.	10	10
				(Alternative is to use Deut. 5:21, Neither shall you covet your neighbor's wife, etc.		

DEC 13 2004
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DEC 13 2004
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IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND NATIONAL COUNCIL OF JEWISH WOMEN, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to defending religious liberty and the separation of church and state. Since its founding in 1947, Americans United has regularly been involved as a party, as counsel, or as an *amicus curiae* in leading church-state cases before this Court and other federal and state courts. Americans United has long experience litigating challenges to government displays of religion and, indeed, is currently serving as counsel to the plaintiffs in several cases in the lower federal courts that challenge Eagles-produced Ten Commandments monuments that are virtually indistinguishable from the one at issue here. As an organization frequently involved in such litigation, as well as in other categories of cases brought under the Establishment Clause, Americans United believes that it can offer the Court special insight into the constitutional issues raised by this case.

People For the American Way Foundation ("PFAWF") is a non-profit, nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 600,000 members and activists nationwide. PFAWF has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend religious liberty and the separation of church and state. PFAWF has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *Amici Curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

at stake in this case, particularly the principles that government officials must remain neutral toward religion, that they cannot act for the purpose of advancing religion, and that government displays that endorse religion trample on religious freedom and violate the separation of church and state.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members, supporters, and volunteers in over 500 communities nationwide. NCJW joins this brief, which is consistent with NCJW's National Principle that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society."

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below concluded that the Ten Commandments monument on the grounds of the Texas State Capitol does not run afoul of the Establishment Clause, in large part because "it has been in place for so long," Pet. App. 16a, and because its retention is "'motivated, in significant part, by the desire to preserve a longstanding [monument].'" *Id.* (quoting *Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 265 (3d Cir. 2003)). This conclusion – that a large freestanding granite monument with the full text of the Ten Commandments situated on the grounds of the Texas State Capitol may be permissible simply because it has existed for a long period of time – is fundamentally misguided.

It is a well-established tenet of Establishment Clause jurisprudence that, although the history of a practice or display may matter, its mere longevity does not. The fact

that a practice or display is longstanding cannot, in and of itself, validate it under the Constitution. Thus, the Court has recognized that some longstanding government practices may be permissible even though they appear on their face to be religious, but only because the practices have lost their religious significance. Similarly, some displays may be maintained when they have secular historical significance apart from the mere passage of time. In order to ensure, however, that an asserted historical rationale is sincere, when the government seeks to justify a display or practice on the basis of its historical significance, courts must engage in a searching inquiry to ensure that the display or practice is being retained for, and communicates a message of, historical rather than religious dimensions. This inquiry must take account of several factors, including whether the display truly has historical significance, whether that historical significance is independent of the display's religious content, whether there are available secular alternatives to achieve the same secular goals, and whether the government has acted consistently with its asserted rationale with respect to non-religious displays.

That only history, and not longevity, should affect the constitutional analysis is reinforced by the fact that plaintiffs raising Establishment Clause challenges face a substantial risk of disapprobation and even violence in their communities. A religious display may become longstanding simply because individuals are deterred from bringing a challenge by the ostracism and risks to personal safety that such a challenge may entail. The Fifth Circuit below was thus wrong to suggest that the absence of a prior constitutional challenge is evidence that the granite monument of the Ten Commandments conveys no message of endorsement of religion and does not offend the significant interests that the Establishment Clause seeks to advance.

ARGUMENT

I. The Longevity Of A Religious Display Does Not Render It Constitutional.

"[H]istory cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (footnote omitted); *see also id.* at 630 (O'Connor, J., concurring) ("Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment."). "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

Thus, if a government-sponsored display demonstrates allegiance to religion in general, or to a particular religion, it will properly be found to run afoul of the Establishment Clause – whether it was erected yesterday, 50 years ago, or 150 years ago.

Indeed, the retention of a longstanding religious display is in some ways more troubling than the erection of a contemporary display because the former course of action conveys the impression that the government's religious allegiance is entrenched and unyielding; it suggests that the message of exclusivity cannot be attributed to a passing fad, but is instead ingrained in the fabric of the community. In such circumstances, the "message to nonadherents that they are outsiders," *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), becomes a message that they have always been, and will forever remain, outsiders.

To be sure, the Court has recognized that some longstanding government practices may be permissible even though they appear on their face to be religious. This conclusion, however, flows not from the longevity of such practices, but from the fact that they have "largely los[t their] religious significance over time." *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring). Thus, the Thanksgiving celebration "is now generally understood as a celebration of patriotic values rather than particular religious beliefs." *Id.*

As even the Fifth Circuit below acknowledged, however, the Ten Commandments have not lost their religious significance over time. *See* Pet. App. 17a (recognizing that "there is no escape" from the Ten Commandments' "religious character"). This acknowledgment is inescapable in light of this Court's recognition that "the Commandments do not confine themselves to arguably secular matters . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day." *Stone v. Graham*, 449 U.S. 39, 41-42 (1980).

Indeed, the Ten Commandments retain not just religious, but also sectarian, significance. The Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* (footnote omitted). It is a "bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith." *Allegheny*, 492 U.S. at 605.

The monument under scrutiny in this case – showcasing a text that a reasonable observer would recognize as promoting religion – cannot be deemed to have lost its religious significance over time. It was thus error for the Fifth Circuit to conclude that the Texas Ten Commandments monument

does not run afoul of the Establishment Clause because "it has been in place for so long." Pet. App. 16a.

Nor does the outcome change because of the claim that the government was "'motivated, in significant part, by the desire to preserve a longstanding [monument],'" Pet. App. 16a (quoting *Freethought Society*, 334 F.3d at 265), or that the monument is a "reminder of past events," 334 F.3d at 265. That is simply another way of saying that the monument can be legitimately retained solely because of its age. Such bootstrapping has no place in the law, under the Establishment Clause or elsewhere. *See, e.g.*, *Gonzales v. North Township*, 4 F.3d 1412, 1422 (7th Cir. 1993) (noting that "[w]e do not accept this sort of bootstrapping argument" that "the longer the violation, the less violative it becomes"); *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) ("[H]istorical acceptance without more does not provide a rational basis for ignoring the command of the Establishment Clause that a state pursue a course of neutrality towards religion.") (quotation marks and citation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) ("[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.") (quotation marks and citation omitted); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1088 (1990) ("[T]he presence of positive laws encroaching upon a right does not negate the fundamentality of that right. If it did, then governments could violate constitutional norms by persisting in a pattern of unconstitutional enactments.").

That is not to say that *history* – as opposed to longevity – makes no difference. The retention of a longstanding display may be justified on a historical basis that is independent of its religious content. Thus, a church that was used as a stop on

the Underground Railroad and is no longer used for religious services may be maintained by the government as an integral part of the history of slavery. That is because, in light of its history, it is "more a museum piece than a symbol of religious worship." *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 631 (9th Cir. 1996) (quoting *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 922 (Cal. Ct. App. 1989)). In order to ensure, however, that an asserted historical rationale is sincere and not a sham, *see Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Stone*, 449 U.S. at 42-43, and that a reasonable observer would appreciate that the display conveys a historical rather than religious message, several factors must be considered.

First, the "display's historical significance must be independent of the display's religious content." *Carpenter*, 93 F.3d at 631 (quotation marks and citation omitted). Thus, although the government could maintain the church that is no longer used for religious services because it was once a stop on the Underground Railroad, the government could not maintain a church because it was once the site of special religious observances. *See, e.g.*, *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993) (refusing to consider "historical significance" of municipality's display of a cross in a city park when principal significance was its "use as the site for annual Easter services"). Similarly, a city seal that includes a cross in order to commemorate the city's religious heritage would be impermissible. *See Friedman v. Board of County Comm'rs*, 781 F.2d 777, 780-82 (10th Cir. 1985), *cited with approval in Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring); *see also Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Harris v. City of Zion*, 927 F.2d 1401, 1414-15 (7th Cir. 1991) (holding that although city's "religious heritage may deserve commemoration, Christian symbols on city seal transcend mere commemoration, and effectively endorse or promote the Christian faith").

Second, the historical event or circumstance that is being commemorated by the display must truly have historical significance. To claim that something has historical significance simply because it happened in the past, or that it has assumed significance simply by virtue of its longstanding existence, would allow the government to maintain or even financially support any pre-existing religious institution or display.[2] Instead, courts must distinguish "the historical significance that a symbol may achieve because of an unusual or unique event or circumstances surrounding it, from the local cultural landmark significance that a symbol may achieve simply because it is displayed." *Gonzales*, 4 F.3d at 1422 n.9. Thus, a crucifix in a public park may not be defended on the ground that by a lengthy existence it has become a local landmark or tourist attraction. *See, e.g.*, *Ellis*, 990 F.2d at 1525 (fact that cross "serves as a navigational aid, or stands as a prominent landmark and tourist attraction," simply "underscore[s] the formidable nature of the display and increase[s] the likelihood of an impermissible appearance of religious preference"). Nor can a religious object without intrinsic historical significance gain historical significance merely by being affixed to a place that does have such significance. *See, e.g.*, *Carpenter*, 93 F.3d at 631 (rejecting government's effort to justify the preservation of a mountaintop cross as evocative of the history of the mountain

[2] That result would be particularly egregious for government-sponsored Ten Commandments displays because many of those displays were not acquired by local governments in the context of an arguably secular historical event, but instead can be traced to concerted campaigns by religious groups to install such monuments to endorse religion. *See infra* note 5. Campaigns by religious groups to place Ten Commandments displays on public property are not just artifacts of history, of course, but continue unabated today. *See, e.g.*, *Ten Commandments Take Center Stage*, ACLU Freedom Network (Jan. 7, 2000), *at* http://archive.aclu.org/news/2000/w010700b.html; *Religious Right Campaign Launched From Upper Michigan*, Freethought Today (Aug. 1997), *at* http://www.ffrf.org/fttoday/1997/august97/front_page.html.

itself, noting that "the Cross does not become imbued with the mountain's history merely because it was erected upon it. Mount Davidson will retain its historical significance with or without a cross atop it").

Third, courts must evaluate the nature of the display, asking whether the same historical goals could be readily achieved in a secular or less religious fashion. *See, e.g.*, *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 707 (1994) (emphasizing the presence of neutral "alternatives" and noting that the State's asserted interests "could be 'readily accomplished by other means'") (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 124 (1982)); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 384 (6th Cir. 1999) (invalidating School Board's use of prayers mentioning Jesus when asserted purpose of "bring[ing] a more businesslike decorum to [Board] meetings" could have been accomplished by more secular means).[3] The ready availability of nonreligious alternatives to advance the same secular interests enhances the message of endorsement.[4]

[3] Although the Court's opinion in *Lynch* suggested that consideration of available secular alternatives might in some cases be "irrelevant," 465 U.S. at 681 n.7, the Court was not applying the endorsement test, which was fully articulated for the first time in Justice O'Connor's concurrence in *Lynch* and elaborated in her concurrence in *Allegheny*. Of course, it is not the case that "an inference of endorsement arises every time government uses a symbol with religious meaning if a 'more secular alternative' is available." *Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring) (calling such an approach "too blunt an instrument for Establishment Clause analysis"). Instead, as the Court recognized in *Kiryas Joel*, the availability of alternatives is one factor that may affect whether "the specific practice in question" conveys a "message that religion or a particular religious belief is favored or disfavored." *Allegheny*, 492 U.S. at 637 (O'Connor, J., concurring).

[4] There are some texts or symbols that so clearly promote one faith over others, or promote religion over nonreligion, that any effort to justify the government's display of them for historical or other reasons should be

Fourth, courts must evaluate whether the asserted historical rationale is consistent with the government's treatment of comparably aged works. Thus, if the government invoked a preservationist rationale to retain a Ten Commandments monument from 40 years ago but made no effort to preserve secular monuments of comparable age, a court could legitimately conclude that the Ten Commandments monument was preserved for religious rather than historical reasons, and that a reasonable observer would perceive the Ten Commandments display as endorsing religion.

Finally, courts should consider whether there is a persuasive, legitimate reason that the display must be preserved on public property rather than in a museum. Thus, for example, the retention of Moses holding the Ten Commandments as part of a larger display in a sculptured wall of a government building is properly viewed more favorably than the continued display in a public park of a granite Ten Commandments monolith that could be moved to

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viewed with extraordinary skepticism. *See, e.g.*, *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) ("There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause[, b]ecause the cross may reasonably be perceived as governmental endorsement of Christianity."); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 1, 14-15 (D.D.C. 1987) (holding that a cross, "[t]he principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message"); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (ordering the removal of a portrait of Jesus from the hallways of a public school because Jesus "is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive"); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000) (holding that statue of Jesus in city park created impermissible perception of endorsement of religion, because "there is no doubt as to the obvious religious message imparted by the statue").

a museum without harm, or than the display of a Ten Commandments poster in a courtroom or a similar plaque upon a government building, either of which can easily be taken down. *Cf.* Letter from Chief Justice William H. Rehnquist to Nihad Awad & Ibrahim Hooper (Mar. 11, 1997) (responding to request that the depiction of Muhammad be removed from the wall of the Supreme Court courtroom and noting that the depiction was "part of an architectural and aesthetic unit" whose alteration "would impair the artistic integrity of the whole"). The government's refusal to transfer a display that is easily transportable to a more appropriate setting may reflect an impermissible purpose or cause the display to convey a message of endorsement of religion.

In this case, the Fifth Circuit identified no non-religious aspect of history that the Ten Commandments monument depicts; it enunciated no event of secular historical significance that the monument commemorates; it failed to evaluate the secular ways in which the Eagles' efforts could have been acknowledged; it neglected to analyze the State's treatment of similarly aged items; and, finally, it provided no reason that the monument, if it truly has historical significance, could not be moved easily to a museum. Instead, the court relied solely on the lapse of forty-two years since the installation of the monument on the Texas State Capitol grounds to assert that "[h]istory matters here." Pet. App. 16a. This assertion, which conflates "history" with "longevity," necessitates a reversal of the decision below.

II. The Absence Of A Previous Challenge To A Longstanding Religious Display Deserves No Weight In The Constitutional Calculus.

The Fifth Circuit purported to bolster its conclusion that the Ten Commandments monument at issue here conveyed no message of endorsement by pointing to the absence of any prior constitutional challenge. Indeed, the Fifth Circuit found

that "[t]his quiescence is remarkable" because "Travis County, the seat of state government and the home of the University of Texas," is "not lacking in persons willing and able to seek judicial relief from perceived interferences with constitutional rights." Pet. App. 16a; *cf. Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (noting that "the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years").

The Fifth Circuit's analysis is fundamentally flawed. The court of appeals' unsupported assertion about the abundance of potential plaintiffs ignores the substantial risks taken and the severe personal sacrifices made by plaintiffs courageous enough to challenge governmental religious displays and practices. As reflected in reported cases and *Amici*'s own experience, plaintiffs in Establishment Clause cases often face threats and intimidation and are frequently the victims of violent attacks. Many individuals are understandably reluctant to put themselves and their families at risk by bringing Establishment Clause challenges.

Some of this reluctance is a product of certain particularly unfortunate eras in our nation's history. Many Ten Commandments displays were erected, for example, during the period following World War I, *see, e.g.*, *Freethought Society*, 334 F.3d at 251 (Ten Commandments plaque dedicated on December 11, 1920), a time when the "enormous heightening of patriotic Americanism . . . reduced the general tolerance for nonconformist behavior," with "the brunt of nativistic intolerance" borne by religious minorities (including Jews, Catholics, Eastern Orthodox, and marginal Protestant denominations). Sydney E. Ahlstrom, *A Religious History of the American People* 899 (1972); *see also Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (considering threat by Oregon officials to close a Catholic school under a

compulsory-education law); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (reviewing conviction of instructor at Zion Parochial School for teaching a foreign language).[5] Such religious hostility was exacerbated by the Great Depression, which gave birth to a number of "religio-political movements" influenced by "nativist bigotry," fostering an atmosphere of "hate and fear." Ahlstrom, *Religious History*, *supra*, at 926-29; *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (considering a challenge brought by a Jehovah's Witness to a compulsory flag-salute regulation); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (same).

The 1950s – when another wave of Ten Commandments displays occurred – witnessed "a new form of patriotic piety that was closely linked to the 'cold war.'" Ahlstrom, *Religious History*, *supra*, at 954. "[T]here seemed to be a consensus that personal religious faith was an essential element in proper patriotic commitment." *Id.* The absence of plaintiffs willing to bring an immediate challenge at the risk of great personal cost during these times is hardly surprising.

But regardless of the overall tolerance of the era, individuals who have had the courage to challenge government sponsorship of religion, including some who appeared before this Court, have been the target of severe persecution and abuse from the public. For example, after

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[5] During this period, plaques of the Ten Commandments and other religious displays were dedicated as part of a campaign spearheaded by the International Reform Bureau ("IRB"). The IRB called itself "a union home missionary society to prevent the heathenizing of our Christian land." *History of the International Reform Bureau* 2 (1910), *reprinted in Patriotic Studies of a Quarter Century of Moral Legislation* (Wilbur F. Crafts ed. 1911). The IRB stated in a self-published magazine its hope that "[t]he whole world might soon be compelled to face the law of God" if its Ten Commandments campaign was successful. *The Very Time to Post the Commandments*, 20th Century Quarterly, Dec. 1918, at 22.

Vashti McCollum brought suit in 1945 objecting to a school district's practice of allowing teachers employed by religious groups to provide religious instruction to public school students in their schools during the regular school day, *see Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), his house was vandalized, he received hundreds of pieces of hate mail, and his son was physically attacked. *See* Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 84-89 (1996).

Similarly, the children of one of the plaintiffs in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (challenge to government-sponsored prayer and Bible reading in public schools), were beaten on their way home from school, and their house was firebombed. Alley, *Without a Prayer*, *supra*, at 98. And the "emotional scars" from harassment suffered by the plaintiff in *Lynch v. Donnelly*, 465 U.S. 668 (1984), went so deep that "[w]hen queried by a newspaper feature writer whether he would ever again take a stand for a controversial belief that clashed with mainstream public opinion, he replied, 'Never!'" Wayne R. Swanson, *The Christ Child Goes to Court* 20-21 (1990).

The plaintiffs in *Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391 (10th Cir. 1985), who sued to stop the distribution of Gideon Bibles and teacher-supervised religious meetings at their children's public school, were the victims of a campaign of "threatening telephone calls and letters." 766 F.2d at 1397. The plaintiffs' children "were called 'devil worshippers' by other students and, in one instance, an upside down cross was hung on" the locker of one of the plaintiffs' sons. *Id.* Plaintiff Joann Bell received calls from persons threatening to burn her house down, rape her, and do violence to her children. *See* Alley, *Without a Prayer*, *supra*, at 107-08. In 1981, as the Tenth Circuit recounted, "the Bells' home was destroyed by a fire of suspicious origin." 766 F.2d at 1397. As Joann Bell

described the devastation, "we essentially lost everything we had." Alley, *Without a Prayer*, *supra*, at 108.

Lisa Herdahl, the mother of six children attending public school in Mississippi, brought suit in 1994 challenging school-sponsored prayer and religious Bible instruction in her children's school. *See Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902 (N.D. Miss. 1995). As a result of the family's challenge to the school district's practices, Herdahl's children were taunted by their classmates, who called them "atheists and devil worshippers." Stephanie Saul, *A Lonely Battle in the Bible Belt: A Mother Fights to Halt Prayers at Miss. School*, Newsday, Mar. 13, 1995 at A8. Other children were threatened with beatings by their parents if they were caught talking to, or playing with, the Herdahl children. Alley, *Without a Prayer*, *supra*, at 177. Herdahl received threats that her home would be firebombed and that her children would be harmed, and she eventually was driven to quit her job to stay home and protect her children. *See id.* at 182, 186.[6]

More recently, the plaintiff in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), was repeatedly harassed

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[6] As the foregoing cases confirm, the children of adults who challenge unconstitutional government-sponsored religious practices are particularly vulnerable to ostracism and other victimization, making individuals who have children especially wary of putting their loved ones at risk by bringing Establishment Clause cases. The cases further demonstrate the often vicious nature of the harassment visited on persons who challenge or object to majority religious practices. *See also Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169, 1172 (S.D. W.Va. 1985) (a Jewish public school student who read during a school-sponsored moment of silence for "contemplation, meditation, or prayer" was taunted by a classmate, who told him that "if I prayed all the time, maybe I could go to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews").

after she sued to enjoin her town council from opening its meetings with sectarian prayers. Her cars were vandalized and her pets were poisoned; someone broke into her home and beheaded her pet parrot, leaving behind a note reading "You're next!" *See* Denyse Clark, *Parrot's Death Latest Threat To Woman In Prayer Case*, The Herald (Rock Hill, S.C.), Aug. 17, 2004 at 1A, *available at* 2004 WL 89767640. *See generally* Alley, *Without a Prayer*, *supra*, (describing intimidation, harassment, and violence suffered by other Establishment Clause plaintiffs).

Amici have first-hand experience with the harassment and intimidation of plaintiffs in Establishment Clause cases. *Amicus* PFAWF, for example, was co-counsel to Lisa Herdahl in the lawsuit discussed above. Earlier this year, other PFAWF clients – Jewish parents Steven and Carol Rosenauer – were also victimized for filing a lawsuit in federal court in Florida challenging government-sponsored Christian prayer at the meetings of their local school board. Soon after the case commenced, a local Christian ministers' group held a public rally to announce its support for the school board's practice, and the head of the group urged the Rosenauers to "move." Laura Green, *A Show of Defiance: Prayer Supporters Rally; A minister tells the crowd of 200 that the couple who filed suit against the School Board should "move,"* Sarasota Herald Trib., Feb. 25, 2004 at BM1. The family received threatening phone calls, including one saying "we know where you Jews live and if you don't drop the lawsuit there will be trouble." During the Jewish holiday of Passover, vandals threw red paint on the Rosenauers' home and truck. *Religious Expression: Hearings Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on Judiciary*, 108th Cong. (June 8, 2004) (Testimony of Steven Rosenauer), *available at* 2004 WL 1304689.

Plaintiffs challenging government displays of the Ten Commandments are no less likely to be subject to harassment and abuse in their communities. When Americans United client Melinda Maddox challenged Alabama Chief Justice Roy Moore's placement of a two-and-a-half-ton Ten Commandments monument in the rotunda of the Alabama State Judicial Building, *see Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003), the windows were shot out of her house, her automobile was vandalized, her law practice was boycotted, and she received multiple death threats. *See* Rob Boston, *Plucky Lindy*, Church & State 11 (Apr. 2004). And her parents – who were both battling cancer at the time – were similarly threatened and harassed. The police did not take the threats seriously. When Maddox asked community leaders to condemn the threats of violence, they responded by telling her to drop out of the case. Eventually, Maddox was forced to leave town. *See id.*

As *Amici* have seen firsthand on numerous occasions, the result of all of this intimidation and violence is that many individuals victimized by unconstitutional governmental religious practices and displays simply do not come forward.

Opinions such as that of the Fifth Circuit below thus vastly understate the genuine risks to individuals and their families who challenge a government religious display or practice, particularly when the individuals are members of a minority faith or are non-religious. Such challenges are undertaken only at great risk. Consequently no plaintiff may come forward to challenge a particular religious display or practice, or it may take years for an individual to muster the courage to do so.

In light of the real and substantial hurdles that Establishment Clause plaintiffs face, the failure of a plaintiff to come forward at an earlier date to challenge the constitutionality of a religious display or practice should be

given no weight in the constitutional analysis. The lack of a prior challenge does not in any way suggest that the display or practice comports with the requirements of the Establishment Clause, nor does it demonstrate that plaintiffs have slept on their rights.[7]

Indeed, statements such as those in the opinion below may actually exacerbate the situation. Placing weight on the absence of earlier challenges may have the unintended consequence of rewarding or even encouraging the intimidation that all too often causes potential plaintiffs to hesitate to come forward in the first place. Moreover, to the extent that the absence of a challenge reflects potential plaintiffs' sincere concern for their personal safety, reliance on that absence may serve to deepen the alienation that adherents of minority religions feel, and thus may reinforce the religious display's unconstitutional message of exclusion.

In short, the Fifth Circuit erred in viewing the absence of a prior constitutional challenge as evidence that the Ten Commandments monument erected on the grounds of the Texas State Capitol does not convey a message of endorsement to a reasonable observer.

CONCLUSION

The decision of the court of appeals should be reversed.

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[7] The absence of dissent within the government is also without relevance. Religious minorities and atheists may have great difficulty being elected in some areas, making it difficult if not impossible for their voices to be heard through official channels.

Respectfully submitted,

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December 13, 2004

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Nos. 03-1500 and 03-1693

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

McCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE*, ANTI-DEFAMATION LEAGUE AND PHILIP A. CUNNINGHAM, PH.D., EXECUTIVE DIRECTOR, CENTER FOR CHRISTIAN-JEWISH LEARNING AT BOSTON COLLEGE, IN SUPPORT OF PETITIONER IN NO. 03-1500, AND IN SUPPORT OF RESPONDENTS IN NO. 03-1693

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INTEREST OF *AMICI CURIAE*[1]

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. It is today one of the leading civil rights and human relations organizations in the world. ADL believes that its stated goals, as well as the general stability of our democracy, are best served through strict separation of church and state and commensurately strict enforcement of the Free Exercise Clause. As an organization rooted in the Jewish community whose mission includes advancing interfaith relations, ADL seeks to offer the Court a clearer understanding of the ineluctably religious provenance of the Ten Commandments and establish why a government-sponsored display of the Decalogue is not inclusive, but rather detrimental to interfaith relations.

Philip A. Cunningham, Ph.D., is Executive Director of the Center for Christian-Jewish Learning and Adjunct Professor of Theology at Boston College. His academic interests include biblical studies, religious education, and Jewish-Christian relations. He is a member of the Advisory Committee on Catholic-Jewish Relations for the United States Conference of Catholic Bishops, and he is a co-convener of the Catholic Biblical Association of America's continuing seminar on Biblical Issues in Christian-Jewish Relations. Dr. Cunningham's curriculum vitae is reproduced in the attached Appendix at 3a. His expertise sheds light on the Decalogue's religious history and its continuing significance as a religious text and symbol.

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[1] This brief concerns, and has been docketed in, both cases before the Court on displays of the Ten Commandments, supporting petitioner in No. 03-1500 and respondents in No. 03-1693. All parties in both dockets have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

The mission of the Center for Christian-Jewish Learning at Boston College is to encourage new relationships between Christians and Jews based not merely on tolerance but on full respect, mutual enrichment and collaborative theological research. This purpose flows from the mission of Boston College and responds to the Roman Catholic Church's vision as expressed by the Second Vatican Council. Under the Center's auspices, scholars representing diverse Jewish and Christian perspectives study all aspects of these related yet distinct faiths. The Center also offers programs in the university and the wider community in which Christians and Jews explore their traditions together. In short, the Center uses the scholarly resources of a Catholic university to encourage mutual knowledge between Christians and Jews at every level.

SUMMARY OF ARGUMENT

The Establishment Clause, at its core, prohibits government from taking sides, or even appearing to take sides, on matters of religious belief. In two cases now before the Court, government has erected or maintained a monumental or framed display of a particular version of the Ten Commandments, outside of a secular program of educational or historical study or debate. Government is proclaiming a message, not inviting a discussion. Yet, that message is fundamentally inconsistent with government's role under the First Amendment.

Often overlooked in legal discussions of the Ten Commandments is the theological understanding of the Ten Commandments, as a text with deep religious meaning, but also with different meanings even among the religious traditions that accept the Decalogue's authenticity as binding rules of law. This brief supplies that theological understanding, and thereby defines the message generally conveyed by public displays of the Decalogue to the reasonable, knowledgeable observer. That message is critical to a proper application of the principles enshrined by the Establishment Clause.

Theological scholarship underscores what this Court recognized in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), that the Ten Commandments are an inherently religious text that no state may embrace. The belief of some state officials that the Decalogue can convey merely a secular message has no foundation in either the history of that document in Judaism and Christianity or in the role it still plays in both religions. This brief's discussion of religious sources and scholarship underscores how the Ten Commandments are a vital expression of religious identity and symbolism – albeit an expression that is far from uniform or free of doctrinal controversy. As we show through historical events and the works of religious scholars over the last two millennia, the Decalogue is not symbolic of a uniform Judeo-Christian legal tradition, but is in fact at the center of historical differences between two different legal traditions. Thus, the notion of the Judeo-Christian tradition – which itself was a mid-twentieth century innovation by American Protestant thinkers – does not provide a theological base on which to build a legal justification for government's display of the Decalogue.

For Jews, the Ten Commandments are part of God's unique covenant with the people of Israel as God's chosen people, and one part of a wider set of binding, biblical laws of divine origin. For Christians, the Ten Commandments are fundamental principles of natural law that, as restated by Jesus, apply to *all* humanity. By viewing the Decalogue in this manner, divorced from its original context at Mount Sinai, early Christianity rejected the remainder of Jewish law – the Law of Moses in the first five books of the Bible (the Torah or Pentateuch) – as outmoded rules that do not apply to the new people of God, the Christians. Accordingly, while the Ten Commandments have important religious meaning for Christians, they also symbolize Christianity's rejection of other principles of Jewish law. The Ten Commandments historically have been used as a symbol of these religious differences. For example, Christian artwork once depicted the two tablets of the Decalogue as a symbol for Judaism's decline.

Any secularized, general notion of Judeo-Christian principles masks this historic tension between these different religious legal traditions, while excluding altogether persons of other religious faiths or with no religious beliefs. That tension is real in the context of these cases. Even the arrangement and wording of the Commandments find no common ground among these religions – yet another example of the Decalogue as a source of theological disagreement. Jewish scholars in particular emphasize that the "Lord your God" who speaks the Commandments is the God who freed them from slavery in Egypt, making clear from that theological perspective His special relationship with the people of Israel and the Decalogue's unique applicability to the Jews.

Government displays of the Ten Commandments therefore will inevitably "take sides," as no authentic display of the Decalogue's text can gloss over the different words and traditions ascribed to this part of the Hebrew scriptures while also taking account of the beliefs of Americans with faiths (like Islam) that do no accept the Decalogue as scripturally accurate, or of Americans with other faiths or no religion at all. This difficulty in creating a generic, secularized notion of the Decalogue acceptable to those of all faiths or of no faith is evident in the record before this Court. It is also why the Court's precedents on "ceremonial deism" have no place in the constitutional jurisprudence applicable to state-sponsored displays of the Ten Commandments' sacred text.

The displays here do have the effect of endorsing a religion, while not respecting others. While the designers of the Texas monument say they sought to erect a "nonsectarian" monument to God, they could do so only by endorsing Judaism or Christianity and ignoring all other religions. By placing Jewish symbolism alongside symbols for Jesus as the Messiah, and elevating a Christian translation of the Ten Commandments for special veneration apart from the rest of Mosaic law, the monument endorses a Christian religious view. The Kentucky courthouse displays make no attempt to be inclusive, instead using a Protestant translation of the Decalogue, omitting

entirely the text that is most fundamental to the Jewish understanding of the Ten Commandments, i.e., the opening reference to the people of Israel ("I the Lord am your God, who brought you out of the land of Egypt, the house of bondage . . . .").

The displays in Texas and Kentucky therefore either promote one religion's view of the Ten Commandments, ignoring the beliefs of others; or they homogenize the Ten Commandments, thereby giving official sanction to minimizing the divergent yet fundamentally religious beliefs of *both* Jews and Christians regarding this sacred text. The text of the Decalogue is no slogan that state officials can fit onto a coin or add to a pledge. The proponents of the Texas and Kentucky displays would undoubtedly agree with *amici curiae* that the words and tablets of the Decalogue have not lost their religious significance and that any judicial finding to the contrary would demean their beliefs and those of many Americans. Indeed, it is the invocation of the Establishment Clause in these very cases that will best serve to protect religion from the weakening of religious authority and belief that can come from secular officials embracing religious practices and texts in a homogenized, secular ceremony or display.

There is no single, generic, secular version of the Ten Commandments. In attempting to construct a display of that sort, government unavoidably must choose – or, to a reasonable, knowledgeable observer, appear to choose – among religious interpretations of the deity and His commands. Religion, and not just the Ten Commandments, is undeniably of historical and cultural importance, but that fact does not justify government displays proclaiming selected religious messages on capitol grounds or courthouse walls. As with any well-known religious prayer of a particular sect, the display of the text of the Decalogue conveys a religious message in this context, in which the display is not part of any program of educational or historical study. Accordingly, the displays here violate the Establishment Clause and should be declared unlawful.

ARGUMENT

Government-sponsored displays of religious subjects make for hard cases, as this Court's own precedents demonstrate. The current conflict before the Court makes clear that monuments to the Ten Commandments are no exception. But to echo an observation made by Justice Brennan, these cases are hard "not because the principles of decision are obscure," but rather because the values expressed in the Ten Commandments are so familiar and, ostensibly, uncontroversial. *See Lynch v. Donnelly*, 465 U.S. 668, 696 (1984) (Brennan, J., dissenting) (commenting on difficulty of case involving crèche). Thus, there is the temptation to view a governmental display of the Ten Commandments as a "nonsectarian" display of generic "Judeo-Christian" principles underlying an American secular legal tradition, rather than as government endorsement of religion.

The history of the Ten Commandments squarely contradicts this view, and, as Justice Holmes observed, "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), especially in Establishment Clause jurisprudence, *see Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (quoting Justice Holmes). As this Court recognized in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Decalogue is an inherently religious text. Moreover, history reveals that the Decalogue represents a flashpoint in a longstanding theological conflict between Jews, who regard it as an expression of God's unique covenant with Israel, and Christians, who venerate the Decalogue as the expression of universal natural law while rejecting the rest of Mosaic law as binding on them.

As the historical and religious references in this brief illustrate, a government that displays a particular religion's version of the Decalogue in the manner now before this Court cannot avoid endorsing one religion's viewpoint while denigrating another's; nor can it avoid alienating those with no religion and adherents of other faiths, some of which, like Islam, regard the Decalogue as an expression of a corrupted textual tradition. These displays

thereby violate the core requirement of the Establishment Clause, which is that government may not take sides, or even appear to do so, on these matters of faith. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . .").

I. The Ten Commandments Are a Religious Text, Subject to Differing Versions and Interpretations by Different Religions.

The scriptures of ancient Israel present the Ten Commandments, referred to in Hebrew as *asereth ha-devarim* (the "Ten Words" or the "Decalogue"), *Deuteronomy* 4:13, 10:4,[2] in two unnumbered lists. The first enumeration of the Decalogue appears in Exodus:

> God spoke all these words, saying:
>
> I the Lord am your God, who brought you out of the land of Egypt, the house of bondage; You shall have no other gods besides Me.
>
> You shall not make for yourself a sculptured image, or any likeness of what is in the heavens above, or on the earth below, or in the waters under the earth. You shall not bow down to them or serve them. For I the Lord your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation of those who love Me and keep My commandments.

[2] Biblical citations in this Section and in Section II.A refer to the 1999 Jewish Publication Society *Tanakh* translation found in THE JEWISH STUDY BIBLE (Adele Berlin & Marc Zvi Brettler eds., 2004). All other biblical citations in this brief, starting with Section II.B, refer to the Christian New Revised Standard Version found in THE NEW OXFORD ANNOTATED BIBLE (Bruce M. Metzger & Roland E. Murphy eds., 1994). Both text and verse numbers (but not chapter numbers) vary between these versions' renditions of the Hebrew scriptures.

You shall not swear falsely by the name of the Lord your God; for the Lord will not clear one who swears falsely by His name.

Remember the sabbath day and keep it holy. Six days you shall labor and do all your work, but the seventh day is a sabbath of the Lord your God: you shall not do any work – you, your son or daughter, your male or female slave, or your cattle, or the stranger who is within your settlements. For in six days the Lord made heaven and earth and sea, and all that is in them, and He rested on the seventh day; therefore the Lord blessed the sabbath day and hallowed it.

Honor your father and your mother, that you may long endure on the land that the Lord your God is assigning to you.

You shall not murder.

You shall not commit adultery.

You shall not steal.

You shall not bear false witness against your neighbor.

You shall not covet your neighbor's house: you shall not covet your neighbor's wife, or his male or female slave, or his ox or his ass, or anything that is your neighbor's.

Exodus 20:1-14. A second version of the Commandments appears in Deuteronomy, following an introduction by Moses explaining their origin:

> Moses summoned all the Israelites and said to them: Hear, O Israel, the laws and rules that I proclaim to you this day! Study them and observe them faithfully!
>
> The Lord our God made a covenant with us at Horeb [Mt. Sinai]. It was not with our fathers that the Lord made this covenant, but with us, the living, every one of us who is here today. Face to face the Lord spoke to you on the mountain out of the fire . . . saying . . . .

Deuteronomy 5:1-5. There follows a similar list of the Commandments, *see id.* 5:6-18, that differs from the Exodus version in a few notable respects. While Exodus provides that God's people should observe the Sabbath because God rested on that day after creating the world, *Exodus* 20:11, in Deuteronomy the commandment derives from Israel's freedom from slavery: "Remember that you were a slave in the land of Egypt and the Lord your God freed you from there with a mighty hand and an outstretched arm; therefore the Lord your God has commanded you to observe the sabbath day." *Deuteronomy* 5:15. Further, the Deuteronomic version reinforces Exodus' command to honor one's parents with the added injunction "as the Lord your God has commanded you, that you may long endure, and that you may fare well, in the land that the Lord your God is assigning to you." *Id.* 5:16.

While both Exodus and Deuteronomy present the Commandments in unnumbered lists, Jews and Christians later organized them in groups of ten, as seen in the attached Appendix at 1a. The differences in their respective groupings reflected a preference between the Exodus and Deuteronomic versions and the different theological emphases of the two communities. *See* WALTER J. HARRELSON, THE TEN COMMANDMENTS AND HUMAN RIGHTS 15-40 (rev. ed. 1997). Thus, Jews include the statement "I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery" in the First Commandment, to emphasize God's special covenant with the people of Israel. *See* Moshe Greenberg, *The Decalogue Tradition Critically Examined*, *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION 83, 99 (Ben-Zion Segal & Gershon Levi eds., Engl. ed. 1990); *infra* Section II.A. By contrast, Roman Catholics and some Protestants typically do *not* include this statement as part of the Commandments themselves – a practice exemplified by both the Kentucky courthouse displays and the Texas monument. *See ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 443 n.2 (6th Cir. 2003); Pet. for Cert. at 8, *Van Orden v. Perry*, No. 03-1500 (filed Mar. 31, 2004) (showing the statement's inclusion in a general heading, not as part of the First Commandment).

Similarly, Jews and many Protestants include the rule against idolatry as a separate commandment, while Catholics include the rule in the First Commandment or omit it entirely. Further, while the Jewish version of the Decalogue proscribes "murder," many Christian translations construe the commandment more broadly to ban all killing. Finally, Jews and most Protestants group the various "coveting" rules into a single commandment, while Catholics and Lutherans break them into two separate commandments. *See* Appendix at 1a. These differences have religious significance, and government is unavoidably involved in religion by selecting a version of the Ten Commandments to present publicly.

Moreover, whatever its form, the Decalogue is scripturally authoritative *only* for Jews and Christians. Islam teaches that Jews and Christians have corrupted the biblical texts and that, as a result, the Quran is the only fully accurate revelatory text. *See, e.g.*, HUSTON SMITH, THE RELIGIONS OF MAN 203 (1958). The Quran contains no counterpart to the Decalogue, although commandments given by the Prophet (not by Allah) in 6:151-153 are somewhat similar in form.[3] Asian religious traditions have no analog whatsoever.

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[3] Those verses provide:

> Say: "Come, I will tell you what your Lord has made binding on you: that you shall serve no other gods besides Him; that you shall show kindness to your parents; that you shall not kill your children because you cannot support them (We provide for you and for them); that you shall not commit lewd acts, whether openly or in secret; and that you shall not kill – for that is forbidden by God – except for a just cause. Thus God exhorts you, that you may grow in wisdom."
>
> Do not tamper with the property of orphans, but strive to improve their lot until they reach maturity. Give just weight and full measure; We never charge a soul with more than it can bear. Speak for justice, even if it affects your own kinsmen. Be true to the covenant of God. Thus He exhorts you, so that you may take heed.

(Continued on following page)

II. The Decalogue Is Not Part of a Generic "Judeo-Christian Tradition" and Historically Has Been a Significant Source of Tension Between These Two Faiths.

A. The Decalogue Enjoys a Special Status in the Jewish Tradition.

The special status of the Decalogue for Jews is evident from the scriptures themselves: The Decalogue was directly revealed by God. *See Exodus* 20:1; *Deuteronomy* 5:4-5. The Bible also tells that God Himself inscribed the words of the Decalogue directly onto stone tablets. *See Exodus* 24:12, 32:15-16; *Deuteronomy* 9:10. While the substance of some commandments was shared by neighboring cultures, this emphasis that the commandments issued directly from God is largely without parallel. Among Orthodox Jews today, this biblical stress on the divine origins of the Decalogue extends to the entirety of the Torah, the first five scriptural books of *Bereshit* (Genesis), *Shemot* (Exodus), *Vayiqra* (Leviticus), *Bemidbar* (Numbers), and *Devarim* (Deuteronomy). Other books come from prophets, sages, or kingly courts, but the Torah comes directly from God. The Ten Commandments, therefore, are no different from, and an integral part of, a larger religious text, all of which is sacred.

The Torah narrates several binding legal agreements between God and human beings. In Genesis, for example, God directs Noah, the other survivors of the great flood, and their descendants – in other words, all of humanity at that time – to populate the earth, not to eat living meat, and not to shed human blood because humanity is created in the divine image. *Genesis* 9:1-11. Eventually, the rabbis referred to these commands (along with God's commands to Adam and Eve) as the Noahide commands, which are

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> This path of Mine is straight. Follow it and do not follow other paths, for they will lead you away from Him. He thus exhorts you, so that you may guard yourself against evil.

THE KORAN 6:151-53 (N.J. Dawood trans., Penguin Books 5th rev. ed. 1999).

binding on the *entire* human race. The Decalogue, however, is different. God presented the Decalogue as part of His singular covenant with the Israelites, all of whom had assembled at Mt. Sinai (Horeb). *See Deuteronomy* 5:1-5. The uniqueness of the covenant is apparent in the initial words of the Decalogue: It is the Lord God *who brought Israel out of Egypt* who commands obedience, *see Exodus* 20:2, and the people of Israel may have no other deities nor make any image of the divine lest they disobey the One responsible for their very survival as a people, *see id.* 20:3-4. After hearing the Decalogue, the people of Israel solemnized the covenant by sprinkling blood on themselves and on an altar, *see id.* 24:3-8, and exclaiming, "All that the Lord has spoken we will faithfully do!" *Id.* 24:7.

For Jews, therefore, the Ten Commandments are more than a mere summary of their legal obligations: Together with the rest of Mosaic law in the Torah, they express Jews' self-understanding as a people chosen by God from all the nations of the world to have a unique relationship with Him and who, as a result, bear unique responsibilities. The Decalogue makes greater demands on the Jews than the universally applicable Noahide laws, and the terms of the Sinai Covenant, including the Decalogue, are unique to the Jewish people.

B. Christianity Rejected Jewish Law but Continued to Venerate the Decalogue as a Religious Text Divorced from Its Jewish Origin.

Christianity emerged in the first century of the Common Era ("c.e.") as a Jewish eschatological movement whose adherents believed that Jesus was the messiah, or Christ, who would save the people of Israel from the Gentile-dominated world. As Christianity spread throughout the eastern Roman Empire, however, non-Jewish populations eventually dominated the membership of the Church, contributing to the separation of Judaism and Christianity. *See generally* JAMES D.G. DUNN, THE PARTINGS OF THE WAYS: BETWEEN CHRISTIANITY AND JUDAISM AND THEIR SIGNIFICANCE FOR THE CHARACTER OF CHRISTIANITY

(1991). This transition generated many disputes over whether all the Laws of Moses governed non-Jewish Christians. Following considerable debate displayed in the pages of the New Testament,[4] Christians generally did not follow Mosaic law, with one notable exception: the Ten Commandments, which they embraced in modified form.

Perhaps because of the biblical traditions of ancient Israel or due to Jewish customs in the time of Jesus, early Christians held the Ten Commandments in special regard. Around 180 c.e., the Christian theologian Irenaeus wrote that anyone who failed to observe the Decalogue would not receive salvation. IRENAEUS, IV AGAINST HERESIES 15:1, *available at* http://www.columbia.edu/cu/augustine/arch/irenaeus/ (last visited Dec. 9, 2004). Irenaeus justified Christians' veneration of the Decalogue over the other, "Jewish" laws of Moses by identifying the Decalogue with the "natural law" that God had written on *every* human heart at creation. *Id.* God originally intended to give *only* the Decalogue to Israel and "did then demand nothing more of them." *Id.* But after the Israelites worshipped the Golden Calf, *see Exodus* 32:1-10, God issued the remaining Mosaic laws to correct their waywardness: "The laws of bondage . . . were one by one promulgated to the people by Moses, suited for their instruction or for their punishment." IV IRENAEUS 16:5.

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[4] For example, the Gospel of Mark advocates abolishing the Jewish dietary laws (*kashrut*) on the ground that Jesus "declared all foods clean." *Mark* 7:19. The Gospel of Matthew argues precisely the opposite, portraying Jesus as instructing:

> Do not think that I have come to abolish the law or the prophets, I have not come to abolish but to fulfill. . . . Therefore, who ever breaks one of the least of these commandments, and teaches others to do the same, will be called least in the kingdom of heaven; but whoever does them and teaches them will be called great in the kingdom of heaven.

Matthew 5:17, 19. Acts of the Apostles adopts a middle ground, teaching that Christians should follow simple food laws (resembling the Noahide commands) so that Jewish and Gentile Christians could share common meals. *Acts* 15:20, 29.

Thus, Mosaic law beyond the Decalogue was not meant for Christians but only for the sinful Jews. In contrast, Jesus had spoken "to all alike the words of the Decalogue; and therefore, in like manner, do they remain permanently with us," *id.* 16:4; *see also Matthew* 19:16-22 (quoting Jesus: "If you wish to enter into life, keep the commandments."). Christians were to obey the Ten Commandments not because they were announced on Mount Sinai – which would legitimate all Mosaic law – but because, as restated by Jesus, they reflected universal natural law. The third-century theologian Origen characterized Mosaic law as an outmoded relic of the divinely cursed Jews.[5] *See* ORIGEN, IV CONTRA CELSUM § 22 (Henry Chadwick trans., Cambridge Univ. Press 1980) ("[Because of the crucifixion the] Jewish nation had to be overthrown, and God's invitation to blessedness transferred to others, I mean the Christians, to whom came the teaching about the simple and pure worship of God. And they received new laws which fit in with the order established everywhere."). Christians, not the Jews, were now the covenanted people of God, and they did not need to obey the Jewish Law of Moses but only the universal Law of Christ.

This linkage between the Decalogue and natural law remains a staple of Christian thought, *see, e.g.*, U.S. CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH § 2070, at 502-03 (1994) ("The Decalogue contains a privileged expression of the natural law . . . .") (citing IV IRENAEUS 15:1), and speaks to the unusual role of the Decalogue in the history of Jewish-Christian polemics and religious belief.

C. Jews Responded to the Rise of Christianity, in Part, by Emphasizing the Decalogue as Only One Aspect of Their Larger, Unique Covenant with God.

Before the rise of Christianity, Jews maintained the special status of the Decalogue: The *Mishnah* describes

[5] The belief that Jews were divinely cursed persisted until after the Nazi Holocaust.

the reading of the Decalogue as part of Temple morning prayer. *See Tamid* V.1. But when Jews were confronted by the natural law theories of the increasingly influential Christian Church, they responded by moderating the Decalogue's preeminence. Thus, the Jerusalem Talmud (circa 350 c.e.) states that Jews no longer recite the Ten Commandments "[b]ecause of the ill-will of the *Minim* ['heretics' or 'apostates']. It became necessary to deny their claim that these Ten were all that were given to Moses at Mount Sinai." Jerusalem Talmud (*Talmud Yerushalmi*), *Berachot* 1:5. Likewise, the Babylonian Talmud (circa 500 c.e.) states that "the practice had long been given up because of the misrepresentations of the *Minim*." Babylonian Talmud (*Talmud Bavli*), *Berachot* 12a. The Rabbi Shlomo Yitzchaki (1040-1105), known as Rashi, explained the purpose of this text as follows: "To prevent them [the disciples of Jesus] from telling the unlearned that the rest of the Torah is untrue; and arguing that only what God spoke at Sinai [as opposed to what was spoken by Moses] should be read to the people." Ezra Zion Melammed, *"Observe" and "Remember" Spoken in One Utterance*, *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION at 191, 212.

A century after Rashi, Rabbi Joseph Kimhi wrote another defensive tract to counter the efforts of baptized Jews to convert their former co-religionists. Here again, the Decalogue was a focal point of contention. Rabbi Kimhi argued that the Torah – not just the Decalogue but the whole of Mosaic law – was God's *entire* revelation, not to be augmented with the Christian New Testament. Nor could any of the Torah's commands be expunged:

> [The two tablets] were inscribed on both sides so that the Gentiles and all the nations which were to follow could not say that God had not completed His work, having left one side of the tablets empty so that He might write other laws and a new Torah. [The writing] was engraved on the tablets so that it could not be erased and so that they could not say that their baptismal waters which were to come could erase the writing in the holy Torah of Moses. They were inscribed on

> both sides *in the same language* and in a *few words* to teach with completeness, wisdom, and knowledge. One may not add to the Torah nor take anything away.

JOSEPH KIMHI, THE BOOK OF THE COVENANT 69-70 (Frank Talmage trans., 1972) (second alteration in original) (footnotes omitted). Thus, from Late Antiquity on, Jews stressed that the Ten Commandments were not categorically different from the other commandments that God had given to Moses on Mount Sinai. All 613 *mitzvot*, i.e., religious commandments, had the same authority behind them, and all were to be obeyed to the full extent possible. All were God's special gift to the people of Israel and *only* the people of Israel – and non-Jews were not expected to observe them.

As a result, by medieval times the Ten Commandments had become emblematic of the religious rivalry between Rabbinic Judaism and Christianity – a rivalry made all the more intense because the two traditions defined themselves in direct opposition to each other. Christians maintained observance of the Ten Commandments despite their dismissal of most of Mosaic Law, primarily because of the Christian equation of the Decalogue with natural law. Jews observed the Decalogue as a distinctive, though not unique, component of the entire Torah, given by God exclusively to the people of Israel. Further, Jews and Christians interpreted the commandments differently, particularly the commandment to observe the Sabbath and the prohibition against images of the divine. Jews frowned upon Christians' celebration of the Sabbath on the wrong day, and saw Christian statues, icons, and paintings as forms of idolatry – all evidence that Christians did not, in fact, keep all Ten Commandments. The Decalogue has played a singular role in the relations between Judaism and Christianity and serves a distinct religious role for each faith, which cannot be secularized by government fiat or the placement of the Decalogue among other secular symbols.

D. Christians and Jews Used the Decalogue as a Symbol for Judaism – but with Very Different Meanings.

The iconic dimension of the Decalogue is further evident in its use as both a Christian and Jewish symbol for Judaism. In medieval times, Christians began to use the two tablets as a symbol for Judaism. Around 1225 c.e., King Henry III required all English Jews to wear on their chests "'the shape of two white tablets made either of linen or of parchment.'" Gad B. Sarfatti, *The Tablets of the Law as a Symbol of Judaism* [hereinafter "Sarfatti"], *in* THE TEN COMMANDMENTS IN HISTORY AND TRADITION at 383, 403 (quoting D'BLOSSIERS TOVEY, ANGLIA JUDAICA, OR, THE HISTORY AND ANTIQUITIES OF THE JEWS IN ENGLAND 79 (Oxford 1738)). In 1275, his successor Edward I further specified that all Jews were to wear "'a badge of yellow cloth in the shape of two tablets, six fingers long, and three fingers wide.'" *Id.* (quoting TOVEY at 202, 205). The majority thus could identify dissenters with ease.

Similarly, a frequent motif in late medieval Christian art was the contrast between the feminine figures of Ecclesia (Church) and Synagoga (Synagogue). *See* HEINZ SCHRECKENBERG, THE JEWS IN CHRISTIAN ART: AN ILLUSTRATED HISTORY 31-74 (John Bowden trans., 1996). Typically, Ecclesia stands proud and erect, regally crowned and holding a Eucharistic chalice in one hand and a triumphant banner in the other. Synagoga, by contrast, is slumped and defeated with a crown falling off her head, and often blindfolded because she fails to see the truth of the Gospel. Synagoga holds in one hand a broken staff, and falling from her other hand is either a torn Torah scroll or the inverted tablets of the Decalogue. *See* illustration, in attached Appendix at 2a. The inverted Decalogue symbolized the Jews' displacement by the Christian church.

In the fifteenth century, Jews began to use the Decalogue as a positive symbol of their own on ornate synagogue Arks used to keep the Torah scrolls. This was a natural association of the synagogue Ark with the biblical Ark of the Covenant, which stored the actual tablets of the

Decalogue. For Jews, the tablets served both to counter the Christian symbol of the cross and to assert the divine origins of the Law. The tablets gradually became a standard symbolic feature in synagogue ornamentation. *See* Sarfatti at 417-18.

The arrangement of the Ten Commandments was also significant. Jewish depictions usually followed the organization given in rabbinic literature, with two tablets each containing five Commandments (the first being "I the Lord am your God . . . ," understood to command belief in the God who freed Israel). Christians typically followed the pattern established by Augustine, placing the first three commandments dealing with obligations toward God on the first tablet and the remaining seven dealing only with human obligations on the second. These arrangements reflect not only different enumeration of the Commandments, *see* Appendix at 1a, but also the different theological emphases of the two traditions. As a result, any visual arrangement of the Decalogue will necessarily reflect: (1) a Jewish theological construction of the Ten Commandments in tablet form; (2) a Christian theological construction of the same; or (3) presented in some other form, a disregard of the distinct understandings of the Decalogue held by Jews and Christians.

E. The Concept of the "Judeo-Christian Tradition" Is a Recent Protestant Innovation that Masks This Historic Tension, Especially with Regard to the Decalogue.

The concept of a "Judeo-Christian tradition" often arises in Establishment Clause cases. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (holding that it is not government's task to promote nonsectarian, Judeo-Christian prayer in context of public school graduations); *Marsh v. Chambers*, 463 U.S. 783, 793 (1983) (upholding solemnizing legislative prayers offered "in the Judeo-Christian tradition"). Given the history of tension between these faiths – with Christians until the twentieth century denying the continuing validity of Judaism, and Jews

seeking to preserve their religious convictions and practices against the rise of a Christian majority – it should come as no surprise that the emergence of this common "tradition" is a relatively recent development. Further, the concept is itself a sectarian creation; rather than elevate the status of minority Jewish and Catholic traditions, it subordinates them to a generally Protestant belief system – a phenomenon particularly evident in the context of displays of the Ten Commandments such as those before this Court.

The term "Judeo-Christian" first appeared in 1899 as a reference to Christianity's roots in biblical Israel. *See* Mark Silk, *Notes on the Judeo-Christian Tradition in America*, 36 AM. Q. 65, 65-66 (1984). As a term used to denote common values shared by Jews and Christians, it became popular in the United States as a slogan against both fascist anti-Semitism and atheistic communism. Some Jews welcomed the expression as an indication of their full participation in American life, but others warned that the concept, however well-intentioned, threatened to absorb Jews' distinctive identity into a generic American Protestant "civil religion." For similar reasons, American Catholics did not embrace the term, and the "Judeo-Christian tradition" remained largely a Protestant phenomenon. *See id.* at 69-79.

Indeed, Protestant thinkers such as Reinhold Niebuhr and Paul Tillich advocated a concept of the Judeo-Christian tradition that, notwithstanding its apparent inclusiveness, incorporated various aspects of the historical struggle between Jews and Christians and between Protestants and Catholics. As noted above, Christians long minimized the legal authority of the Torah. Protestant thinkers instead emphasized the prophets as the critical commonality between Jews and Christians, thereby continuing the Christian preference for the prophetic books of the Old Testament as pointing to the coming of Christ.[6]

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[6] This Christian preference for the prophets over the Torah (known to Christians by its Greek name, the Pentateuch), is reflected in the practices of those churches that use a common lectionary for readings

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Thus, Niebuhr wrote that "'I have, . . . as a Christian theologian, sought to strengthen the Hebraic-prophetic content of the Christian tradition,'" *id.* at 71 (quoting Reinhold Niebuhr, *Introduction* to WALDO FRANK, THE JEW IN OUR DAY at 3, 4 (1944)), while Tillich argued that Christianity was "'always in danger of losing her prophetic spirit'" and therefore needed "'the prophetic spirit included in the traditions of the synagogue,'" *id.* at 71-72 (quoting unpublished Tillich manuscript quoted in A. ROY ECKHARDT, CHRISTIANITY AND THE CHILDREN OF ISRAEL 146-47 (1949)). Niebuhr in particular saw the Hebrew prophets as brothers in arms in combating the teachings of the Catholic Church, which, by proclaiming the pope as the vicar of Christ on earth, was "'inferior to Hebraic prophetism in failing to observe a proper distinction between the divine and the human.'" *Id.* at 77 (quoting REINHOLD NIEBUHR, THE SELF AND THE DRAMAS OF HISTORY 103 (1955)).

Catholics and Jews alike opposed this Protestant construction of the "Judeo-Christian tradition." One Jesuit theologian, John Courtney Murray, responded that Protestantism, Catholicism, and Judaism were "'radically different'" religious traditions, none of which "'is reducible, or perhaps even comparable, to any of the others.'" *Id.* at 77 (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 138 (1960)). Their co-existence in American society was possible, not because of any common lineage, but because of "'the articles of peace which are the religion-clauses of the First Amendment.'" *Id.* (quoting MURRAY at 125). For their part, Jews concerned about maintaining traditional teachings and practices saw the "Judeo-Christian tradition" as another instance of Christians supplanting the Torah, their most authoritative biblical texts, by exalting the prophets. Thus, Jewish scholar Bernard Heller praised Tillich's love of "'the prophetic spirit included in the tradition of the Synagogue,'" but he

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during worship. Readings from the prophetic books outnumber readings from the Pentateuch by a margin of approximately three to one.

stressed the difference between the centrality of Christ for Christians and of the Torah for Jews and refused "'to accept the kiss of death'" that the "Judeo-Christian tradition" represented for Judaism. *Id.* at 78-79 (quoting Bernard Heller, *About the Judeo-Christian Tradition*, 1 JUDAISM 257, 260-61 (1952)).

As a result, while the concept of a "Judeo-Christian tradition" represents a commendable effort to be inclusive, it masks an assimilation of minority Jewish and Catholic religious practices into the general American Protestant ethos, and a disregard for the views of those who are not Protestant, Catholic, or Jewish. Seen in this light, government efforts to present the Ten Commandments in a "nonsectarian" or "Judeo-Christian" form obscure the distinctive Jewish and Christian understandings of their significance. Attempts to make the Decalogue both Jewish (reflecting God's unique covenant with the Israelites) and Christian (adopting a universal natural law divorced from other Jewish law) yield instead a Decalogue that is neither. Moreover, this Decalogue would plainly stand apart from other religions (such as Islam) and alienate those with no religious belief. *See Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) (using a crèche in "a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence" is "a misuse of a sacred symbol").

III. The Texas and Kentucky Displays Exemplify the Tensions Between the Jewish and Christian Traditions and Demonstrate How Displays of the Decalogue Violate the Establishment Clause.

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Court summarized its Establishment Clause jurisprudence by noting that, "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Id.* at 592 (citing *Engel v. Vitale*, 370 U.S. 421,

436 (1962)). The crucial question, therefore, is whether a display of the Decalogue reflects the state's desire to promote or disfavor a religious viewpoint, either in actuality or as perceived by a reasonable observer:

> Whether the key word is "endorsement," "favoritism" or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Id. at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)); *see also id.* at 630-31 (O'Connor, J., concurring in part and concurring in the judgment) (noting that reasonable observer in endorsement inquiry is presumed to be familiar with the community and the history of the practice at issue).

The history of the Decalogue as both a religious text and a lightning rod in theological disputes between Judaism and Christianity supplies the answer to the question before the Court: The governmental displays of the Ten Commandments in Texas and Kentucky violate the Establishment Clause. When the state erects a monumental or framed rendition of this sacred text, with a particular selection and arrangement of text and symbolism divorced from a program of study and dialogue, it inevitably creates the appearance that government has endorsed – or demeaned – at least one form of religious belief.

A. The Ten Commandments Are Inherently Religious, and by Displaying a Single Version of Them, These Displays Send a Religious Message.

The Decalogue is not only largely religious in its words, but – like any familiar prayer – it is inherently associated with religion: Indeed, the Ten Commandments fall at the core of religion. For many Jews, they symbolize the very word of God and His unique covenant with the Jewish

people. For Christians, they are the text of universal natural law, restated by Jesus and removed from their original context at Mt. Sinai – and thus, until very recently, they also symbolized Christianity's rejection of Judaism and Jewish law more generally. For Muslims, the Decalogue has quite a different meaning, for its particular words and the symbol of the tablets represent a corrupted or inferior expression of divine revelation. And over time Judaism and Christianity have alternatively encouraged or suppressed public recitation or veneration of the Commandments, and used them as religious symbolism, with those choices having very different meanings for each religion.

Thus, the Decalogue *is* religious speech, religious identity, and religious symbolism. But it is *not* symbolic of *all* religions in some generic sense, as no static, public display of a single interpretation of the Decalogue could carry that weight. That task is all the more complicated because there is no generalized "Judeo-Christian" notion of the Ten Commandments acceptable to Jews and Christians. Even if Judaism and Christianity were the *only* religious influences on Western thought, a display of the Decalogue simply could not be all things to all people.

The Texas and Kentucky displays illustrate the dilemma in trying to create a generic celebration of the Decalogue. As described in numerous appellate decisions, the Texas monument arose as part of a wide-ranging effort to use a purportedly "nonsectarian" version of the Ten Commandments to teach American youth a common code of conduct. *See, e.g.*, *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 294-95 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001). Yet, the Texas monument contains two small Stars of David *and* the superimposed Greek letters Chi and Rho, a symbol for Christ. *See Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003).[7] This juxtaposition in a government display is troubling, especially for Jews who would object to

[7] There are no symbols representing other religious traditions on the monument – nor could there be, for no other traditions regard the Decalogue as authoritative.

any Jewish symbols appearing alongside a symbol designating Jesus as the Messiah and under a Christian translation of only ten of the 613 Mosaic commands. As for the Commandments themselves, the Texas monument depicts two small tablets containing a Hebrew version of the Decalogue, with the Commandments evenly divided between the tablets as in the Jewish tradition. *See supra* Section II.D. But as its primary presentation of the Decalogue, the monument contains an abbreviated, unnumbered English version of the commandments in a single column, taken from the Protestant King James Bible.[8] While the designers sought to be inclusive on the numbering and organization of the commandments, no arrangement of the commands will alter the implication of the first words, "I am the Lord your God," for Jewish viewers. Jews view this as a reference to God, who freed them from slavery in Egypt and who commands as part of the Sinai covenant. Its presentation on the monument alongside Christian symbolism appears to signify that the Sinai covenant includes non-Jews or that the Decalogue is severable from the rest of the covenant – neither of which is acceptable in the Jewish tradition.

The Texas monument exemplifies the problems of the "Judeo-Christian" ethic, at least as applied to the Decalogue. By adopting an apparent "Judeo-Christian" interpretation of the Ten Commandments, the monuments appear to endorse these faiths over other religious beliefs or the absence of any belief – the monument is "nonsectarian" only if one forgets, for the moment, about sects other than Judaism or Christianity. *See County of Allegheny*, 492 U.S. at 615 ("The simultaneous endorsement of Judaism or Christianity is no less constitutionally infirm than the endorsement of Christianity alone.") (opinion of Blackmun, J.). It thus communicates an exclusionary message prohibited by the Establishment Clause. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)

[8] The King James translation differs noticeably from the Catholic translation in use when the monument was erected, yet the designers apparently hoped that this text would be acceptable to Protestants and Catholics alike.

("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). At the same time, attempting to homogenize the Decalogue's defining characteristics for Jews and Christians distorts these fundamental aspects of religious identity. *See id.* at 727 (Blackmun, J., dissenting) (noting that use of a crèche in "a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence" is "a misuse of a sacred symbol"). Finally, even if a "Judeo-Christian" slant on the Decalogue were historically or theologically justified, it is not the state's place to promote that interpretation:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

Lee v. Weisman, 505 U.S. 577, 589 (1992).

The courthouse displays in McCreary and Pulaski Counties, Kentucky, present the other horn of the dilemma; rather than homogenize the Jewish and Christian interpretations of the Decalogue, these counties simply adopted a particular Christian version. The displays use the King James translation of Exodus, thereby appearing to prefer that Protestant text to either the Jewish or Catholic translations. *See ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 443 n.2 (6th Cir. 2003). Further, and of great religious significance, the displays leave out the prefatory statement "I am the Lord your God," *see id.*, omitting what is, for the Jew, perhaps the single most important statement in the entire Decalogue, *see supra* Section II.A. From that perspective, the display represents the counties' rejection of the true meaning of the Decalogue as part of

God's unique covenant with Israel. Even if that was unintentional, the effect is a demeaning caricature of a sacred text. Either message is constitutionally infirm.

B. The Historical Importance of the Decalogue Does Not Justify the Displays that Are Before the Court.

The State of Texas and McCreary and Pulaski Counties, Kentucky, justified their displays by invoking the historical, secular importance of the Ten Commandments. *See McCreary*, 354 F.3d at 446-47; *Van Orden*, 351 F.3d at 177. But the Texas monument itself conveys no such message, while the Kentucky displays contain no discussion of the Decalogue other than the bald assertions that it has "profoundly influenced the formation of Western legal thought and the formation of our country" and provides "the moral background of the Declaration of Independence and the foundation of our legal tradition." *McCreary*, 354 F.3d at 443. Moreover, even accepting these statements of secular purpose, the historical significance of the Decalogue does not outweigh the religious messages conveyed by the displays.

Undoubtedly, the Decalogue is of historical importance – but then so is much in religion. The Decalogue's general familiarity to most inhabitants of our Nation does not mean that the state can safely assume that a viewer of its display perceives it *ipso facto* as purely a "historical document" or as an "educational" exhibit about the development of Western culture or Western law. Here, the displays lacked any such historical or educational context.[9] They thus differ from other displays of the Commandments that are presented in a clearly secular manner:

> [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate .... Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers.

County of Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part).

The Decalogue, even in just one of its forms, unquestionably *could* be included in a public high school course as part of a properly planned curriculum on historical texts. But it would defy logic and common sense to conclude here that the monumental display of the Decalogue in a particular form on the grounds of a state capitol, or framed on the wall of a county's halls of justice, has only an educational meaning. Indeed, in the Kentucky case, it is hard to imagine the curator of a display presented solely for secular study to be as devoted as the county employees were here to modifying the display repeatedly to satisfy judicial scrutiny. Remarkably, in all the changes that were made, Kentucky's adopted version of the Decalogue never changed, in all instances maintaining its steadfast adherence to a particular understanding of the Decalogue, in the very halls where litigants – both Christian and non-Christian, religious and non-religious – walk to find redress for discrimination or vindication from the state's accusations of wrongdoing. As for the Texas monument, it is permanent in its features and not part of any curator's secular effort to educate about the topic of religion.

While in some contexts, an "explanatory plaque" may confirm that a public display of a religious symbol does not represent the government's sponsorship of religious beliefs, *see id.* at 619 (opinion of Blackmun, J.), in light of the contentious religious history of the Decalogue and the central role it plays in Judaism and Christianity, only a substantial educational discourse on the religious, historical

[9] For example, there would be no constitutional problem with a Utah state capitol monument depicting Brigham Young and other Mormons traveling to the territory to establish their home, as a depiction of that state's history.

and ethical relationship between the Ten Commandments and the development of American law and mores would be sufficient to present the Decalogue in a way that avoids a message of government endorsement. Certainly the mere display of the Decalogue in proximity of other secular symbols is not enough to secularize this deeply religious symbol. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (contrasting the use of the Decalogue in a school curriculum with its mere posting on a school wall). But Texas and Kentucky chose instead to erect a single, static, enduring display, leaving the viewer to perceive nothing but an impermissible religious message.

C. The Ten Commandments Are Not Part of Any "Ceremonial Deism," Nor Should They Be.

At various times, this Court and individual Justices have recognized that some government conduct that might formally be considered religious does not implicate the Establishment Clause because it poses no significant threat of establishing a state religion or has, over time, lost its religious meaning. *See Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that 200-year practice of opening Congress with prayer poses no threat to religious freedom); *Lynch*, 465 U.S. at 676 (noting the use of "In God We Trust" as the national motto and "One Nation under God" in the Pledge of Allegiance); *id.* at 716 (Brennan, J., dissenting) (noting that religious references in Pledge of Allegiance and motto should be "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2326 (2004) (O'Connor, J., concurring in the judgment) (describing "under God" in Pledge as a "highly circumscribed reference to God" and "tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system"). Whatever the legal or cultural merits of "ceremonial deism" such as that exhibited in legislative prayer or the national motto, displays of the Decalogue plainly do not invoke that concept. As the history

of the Decalogue makes abundantly clear, the Ten Commandments implicate fundamental questions of religious identity – for the Jew, his identity as a member of God's chosen people; and for the Christian, her adherence to natural laws that Jesus Christ restated for all humanity. As this Court has rightly recognized, "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." *Stone*, 449 U.S. at 41.

While Jews and Christians interpret the Decalogue differently, they would certainly share a common revulsion at the idea that its display should be exempt from the Establishment Clause because the Commandments have lost their religious content. Indeed, that "finding" as if it were a matter of judicial notice would be a constitutional and theological outrage, for Jews and Christians generally, and no doubt for the proponents of the Texas and Kentucky displays. As the Court recognized in *Engel v. Vitale*, 370 U.S. 421 (1962), the Establishment Clause exists not only to protect the vitality of the state, but also that of the church:

> [The Establishment Clause's] first and most immediate purpose rested on a belief that *a union of government and religion tends* to destroy government and *to degrade religion*. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.

Id. at 431-32 (footnotes and citations omitted) (emphasis added).

In addition to alienating nonbelievers, Jews, Christians, Muslims, Hindus and others alike, the Texas and Kentucky displays are likely to have precisely this degrading effect: In Texas, by homogenizing the Jewish and Christian interpretations of the Decalogue into a watered-down version satisfying to neither group, and in Kentucky, by blanketly asserting, with no evidentiary support, some fundamental connection between the King James text of the Commandments and American democracy. It would be ironic – and most unwelcome from the perspective of *amici* – if upholding these displays contributed to devaluing a sacred text dear to many of this country's faithful.

* * *

Twenty-four years ago, in *Stone v. Graham*, this Court recognized that the Constitution placed limits on the government display of the Ten Commandments, because the Decalogue is "undeniably a sacred text in the Jewish and Christian traditions" and thus the purpose of a statute requiring its posting in public classrooms was "plainly religious in nature." *Stone*, 449 U.S. at 41. While venerating the Commandments might be desirable "as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Id.* at 42. The Court's subsequent elaboration of the "endorsement" inquiry under the Establishment Clause, and history's demonstration of the impossibility of posting a universally acceptable or "generic" version of the Decalogue, confirm that *Stone* was rightly decided. The Ten Commandments are inherently religious, and the state cannot present a single interpretation of them in a static display without necessarily endorsing or denigrating at least one religious view. In their current form, the Texas and Kentucky displays violate the Establishment Clause.

CONCLUSION

In No. 03-1500, the Court should reverse the judgment of the court of appeals. In No. 03-1693, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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December 13, 2004

VARIOUS WAYS OF NUMBERING THE DECALOGUE (EXODUS 20:2-17 (RSV))

Abbreviated Commandments by verse no.	Jewish	Augustine (5th Century)	Roman Catholic, Lutheran	Reformed Christian	Orthodox Christian	Josephus (1st Century)	Philo (1st Century)
2. I am the Lord your God, who brought you out of the land of Egypt, etc.	1	-	-	1	-	-	-
3. You shall have no other gods before me.	2	1	1	1	1	1	1
4-6. You shall not make yourself a graven image, or any likeness of anything, etc.	2	1	(omitted or included in 1)	2	2	2	2
7. You shall not take the name of the Lord your God in vain, etc.	3	2	2	3	3	3	3
8-11. Remember the Sabbath day, to keep it holy, etc.	4	3	3	4	4	4	4
12. Honor your father and your mother, etc.	5	4	4	5	5	5	5
13. You shall not kill.[2]	6	5	5	6	6	6	7
14. You shall not commit adultery.	7	6	6	7	7	7	6
15. You shall not steal.	8	7	7	8	8	8	8
16. You shall not bear false witness against your neighbor.	9	8	8	9	9	9	9
17a. You shall not covet your neighbor's house.	10	9 (wife)	9	10	10	10	10
17b. You shall not covet your neighbor's wife, etc.	10	10 (rest of *Dt.* 5:21)	10	10	10	10	10

[1] Adapted from WALTER J. HARRELSON, THE TEN COMMANDMENTS AND HUMAN RIGHTS 40 (rev. ed. 1997). Some textual differences result from the use of the Deuteronomic text rather than the Exodus text.

[2] In the Jewish tradition, this Commandment unambiguously prohibits murder, or illegal killing (in Hebrew, *ratzach*), while Christian translations often construe the Commandment more broadly to prohibit all killing.

Illustration

Images of Ecclesia and Synagoga on the west portal of the Liebfrauen-kirche in Trier, Germany, dating to approximately 1250 c.e, taken from HEINZ SCHRECKENBERG, THE JEWS IN CHRISTIAN ART: AN ILLUSTRATED HISTORY 50 (John Bowden trans., 1996). Note the inverted Tablets of the Decalogue in Synagoga's hand.

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Philip A. Cunningham

Current Positions

Boston College, Chestnut Hill, Massachusetts, 02467 (2000 – present)

- Executive Director of The Center for Christian-Jewish Learning
- Adjunct Professor of Theology

College Teaching Experience

Undergraduate

- The Hebrew Bible: Story of the Chosen People
- The Christian Scriptures: The Church's Testament
- Jesus, the Christ (team-taught)
- The Johannine Writings
- The Jewish-Christian Encounter
- The Prophets
- The Christian Scriptures and Jewish-Christian Relations

Graduate

- The Torah: The Teaching of the Lord *
- The Prophets: Consciences of the Covenant *
- The Writings: Treasury of Religious Thought
- Letters of Paul: Conversations in the Earliest Churches *
- Synoptic Gospels: Expressions of Dynamic Faith *
- Gospel of John: Reinterpreting the Jesus Tradition *
- Biblical Interpretation: Using the Bible in Today's Church

- The Ministry of Jesus: A Historical Reconstruction
- The New Testament in Its Jewish Context (team-taught)
- Interfaith Study Tour to Israel: Finding Our Roots Together
- Philosophy of Religious Education
- Directing Religious Education Programs
- The Christ of Faith (team-taught)
- The Church Through the Ages (team-taught)
- The Triune God: The Relational Nature of the Divine (team-taught)
- Christians and Jews: Encountering the Other (team-taught)
- Educating Toward the Other: Christians and Jews (team-taught)
- Early Jewish-Christian Interactions (team-taught)
- Four Biblical Books in Jewish and Christian Perspectives (team-taught)

Previous Positions

- Junior High School Teacher, St. Teresa School, Woodside, NY, 1973-1977.
- Junior High School Teacher, St. Augustine Regional School, Ocean City, NJ, 1977-1980.
- Parish Director of Religious Education, St. Peter Parish, Pleasantville, NJ, 1980-1983.
- Co-Director of the Salem Deanery Christian Life Center (adult religious education center, offering undergraduate-level courses), 1983-1988.
- Director of The Ministry Institute (1991-2000); Co-Director of The Shalom Center (1994-1999); Associate Professor of Theology (1991-1996); Professor of Theology (1997-2000) at Notre Dame College, 2321 Elm Street, Manchester, NH 03104.

- Adjunct professor, St. Anselm College, Manchester, NH, 1997; Merrimack College, North Andover, MA, 1998; Boston College, 1999-2000.

Education

- Fordham College, Bronx, NY
  Bachelor of Arts (History), 1972
- Fordham Graduate School of Education, Lincoln Center, NY
  Master of Sciences in Education (Curriculum and Teaching), 1977
- LaSalle University, Philadelphia, PA
  Master of Arts in Religious Education (Theology – NT), 1984
- Boston College, Chestnut Hill, MA
  Doctor of Philosophy in Religion and Education, 1992 Dissertation: "A Content Analysis of the Presentation of Jews and Judaism in Current Roman Catholic Religion Textbooks"

Publications

Books:

- *Walking God's Paths: Christians and Jews in Candid Conversation* – Video series (United States Conference of Catholic Bishops: Catholic Communications Campaign and The National Council of Synagogues, 2004) and Users' Guide. (www.bc.edu/wgp, 2003).
- *Sharing the Scriptures: Volume 1* of *The Word Set Free* (New York/Mahwah: Stimulus Foundation/ Paulist Press, 2003).
- *A Story of Shalom: The Calling of Christians and Jews by a Covenanting God;* (New York/Mahwah: Stimulus Foundation/Paulist Press, 2001).
- *Christian Documents Library*, an online collection of Christian ecclesial documents on Jews and Judaism or

Jewish-Christian relations published online at: http://www.bc.edu./bc_org/research/cjl/documents.html

- *Sharing Shalom: A Local Interfaith Dialogue Process.* Edited with Rabbi Arthur Starr. (Mahwah/New York: Paulist Press, 1998).
- Revision/expansion of grade 6 (Hebrew Bible) student text, school ed. of *This Is Our Faith* religion textbook series (Silver, Burdett, Ginn, 1998).
- *Proclaiming Shalom: Lectionary Introductions to Foster the Catholic and Jewish Relationship* (Collegeville, MN: Liturgical Press, 1995).
- *Education for Shalom: Religion Textbooks and the Enhancement of the Catholic and Jewish Relationship* (Collegeville: Liturgical Press, 1995).
- *Jesus and the Evangelists: The Ministry of Jesus in the Synoptic Gospels* (Mahwah/New York: Paulist Press, 1988; 2nd ed.; Lanham, MD: University Press of America, 1993).
- *Jewish Apostle to the Gentiles: Paul As He Saw Himself* (Mystic, CT.: Twenty-Third Publications, 1986).

Articles:

- (In press) "Reflections from a Roman Catholic on a Reform Theology of Christianity," *CCAR Journal,* A Reform Jewish Quarterly (spring, 2005).
- (In press) Articles for the forthcoming *A Dictionary of Jewish-Christian Relations* (Cambridge Univ. Press, 2005): "Biblical Criticism;" "Biblical Theology;" "Cross/ Crucifix;" "Jewish-Christians relations, Centres of;" and "Textbooks."
- (In press) "Covenant and Conversion," in the forthcoming Mary C. Boys, ed., *Seeing Judaism Anew: Christianity's Sacred Obligation*.
- (In press) "The Gospels" entry for the forthcoming *Encyclopedia of Anti-Semitism*, Santa Barbara, CA: ABC-Clio Press, March 2005.

- "Introduction: The Passion – What's at Stake for Christians and Jews?" and "A Challenge to Catholic Teaching" in Philip A. Cunningham, ed., *Pondering the Passion: What's at Stake for Christians and Jews?* (Franklin, WI and Chicago: Sheed & Ward, 2004).
- "Much Will Be Required of the Person Entrusted with Much: Assembling a Passion Drama from the Four Gospels" in *Perspectives on The Passion of the Christ* (New York: Miramax Books, 2004): 49-64.
- "Christians and Jews: Children of a Covenanting God," *The Living Light* (Spring 2004).
- "A Dangerous Fiction," *America* 190/12 (April 5, 2004): 8-11.
- "Gibson's Limited Vision Often at Odds with Bible," *The Irish Echo*, 78/9 (Mar. 3-9. 2004): 15.
- "Pondering the Passion," *The Anglican Theological Review*, 86/2 (Spring 2004): 323-333.
- "The Arrest and Sentencing of Jesus: A Historical Reconstruction," *Journal of Religion and Society*, Vol. 6 (2004): http://moses.creighton.edu/JRS/2004/2004-8.html.
- Actualizing Matthean Christology in a Post-Supersessionist Church," to appear in *When Judaism and Christianity Began: Essays in Memory of Anthony J. Saldarini* (Leiden and Boston: E.J. Brill, 2004).
- "Theology's 'Sacred Obligation': A Reply to Cardinal Dulles on Evangelization," with Mary C. Boys and John T. Pawlikowski, *America,* 187/1 (Oct. 21, 2002): 12-16.
- "Liturgical Readings of the Passion Project," online summary with lections prepared by the Continuing Seminar on Biblical Issues in Jewish-Christian Relations of the Catholic Biblical Association of America, co-convened with John Clabeaux. http://www.bc.edu/bc_org/research/cjl/CBA_Seminarl/PNproject.htm

- "A History of the Middle-east Conflict," published online at: http://www.bc.edu/bc_org/research/cjl/Israel_Palestine/introduction.htm
- "Implications for Magisterial Catholic Teaching on Jews and Judaism", in Stephen Pope and Charles Hefling, eds., *Sic et Non: Encountering Dominus Iesus* (Maryknoll, NY: Orbis Books, 2002): 134-149.
- "Translating and Excerpting the Johannine Passion Narrative for Liturgical Proclamation" in *The SIDIC Review*, 34/3 and 35/1 (2001-2022): 8-18.
- "Do Jews and Christians Worship the Same God?" (co-authored with Jan Katzew) in *Irreconcilable Differences? A Learning Resource for Jews and Christians* (Boulder, CO: Westview Press, 2001): 33-51.
- "Die Darstellung des Judentums in den synoptischen Evangeliein", in *Studien zu einer neutestamentlichen Hermeneutik nach Auschwitz*, eds., Peter Fiedler and Gerhard Dautzenberg, hrsg. (Stuttgart: Verlag Katholisches Bibelwerk GmbH, 1999): 53-88.
- "Jews and Judaism in Catholic Religion Textbooks: Progress, Problems, and Recommendations," in *Removing Anti-Judaism from the New Testament,* eds. Howard Clark Kee and Irvin J. Borowsky (Philadelphia: American Interfaith Institute, 1998) 134-142.
- "New Stories for a New Relationship," *Religious Education,* 91/4 (Fall, 1996) 512-518.
- "Romans 9-11 and Modern Jewish-Catholic Relations: Reflections in Honor of the 30th Anniversary of *Nostra Aetate," Professional Approaches for Christian Educators,* 25, Oct 1995: 3-10; Nov 1995: 3-9.
- "Catechesis and the Crucifixion: An Exegetical, Interfaith, and Pastoral Concern," *The Priest* (April, 1995) 11-14.
- "The Synoptic Gospels and Their Presentation of Judaism," in David P. Efroymson, Eugene Fisher, & Leon Klenicki, eds., *Within Context: Essays on Jews &*

Judaism in the New Testament (Liturgical Press, 1993) 41-66.

- "Jews and Judaism in Catholic Religion Textbooks: Progress, Problems, and Recommendations," *Professional Approaches for Christian Educators,* 22 (Dec, 1992) 17-21.
- "To Know Him is to Love Him," *Religion Teachers' Journal*, 23/4 (Sept, 1989) 8-9.
- *The Apostle Paul: His Mission and Message* (Milwaukee: Hi-Time, 1987) [A six-week high-school curriculum].
- *The Apostle Paul: Male Chauvinist or Proponent of Equality?* (Milwaukee: Hi-Time,1986) [An adult study guide].

Reviews

- "Gibson's *The Passion of the Christ*: A Challenge to Catholic Teaching," (2004) Center for Christian-Jewish Learning at Boston College website: http://www.bc.edu/research/cjl/meta-elements/texts/reviews/gibson_cunningham.htm
- James Carroll, *Constantine's Sword: The Church and the Jews: A History* in *The SIDIC Review*, 34/2 (2001).
- Tikva Frymer-Kensky, David Novak, Peter Ochs, David Fox Sandmel, Michael A. Signer, eds., *Christianity in Jewish Terms* in *The SIDIC Review,* 34/1 (2001): 28-29.
- Frank E. Eakin, Jr., *What Price Prejudice? – Christian Antisemitism in America* in *Cross Currents*, Winter, 1999.
- Jacob Neusner, *A Rabbi Talks With Jesus: An Intermillennial, Interfaith Exchange* in *New Theology Review*, 9/1 (Feb, 1996) 101-103

Professional Papers

- "Covenant and Conversion," Oct., 2003 meeting of the Christian Scholars Group on Christian-Jewish Relations, Hingham, MA
- "Judaism as 'Sacrament of Otherness,'" annual meeting of the International Council of Christians and Jews, Utrecht, The Netherlands, June 30, 2003.
- "The Pontifical Biblical Commission's 2001 Study on *The Jewish People and Their Sacred Scriptures in the Christian Bible*: Selected Important Quotations with Comments," published on the worldwide web and utilized at the May, 2002 meeting of the Christian Scholars Group on Christian-Jewish Relations, Attleboro, MA.
- "Catholic Reflections on Covenant and Mission" (Catholic coordinator), presented at the Bishops Committee on Ecumenical and Interreligious Affairs – National Council of Synagogues Consultation, New York, March 13, 2002.
- "Eschatology, Fulfillment, and Co-covenanting Communities," a response to papers by Cardinal Walter Kasper and Rabbi Norman Solomon, Sacred Heart University, Fairfield, CT, December 4, 2001.
- "A New Future: Building Shalom between Catholics and Jews," a sample user's guide accompanying a pilot educational video, the latter co-produced with John Michalczyk, presented to the Bishops' Committee on Ecumenical and Interreligious Affairs, U.S. Conference of Catholic Bishops and the National Council of Synagogues, Baltimore, MD, November 28, 2001.
- "Translating and Excerpting the Johannine Passion Narrative for Liturgical Proclamation," Catholic Biblical Association of America annual meeting, Seton Hall University, August 4-7, 2001.
- "Interpreting the 'Old Testament' as a 'Shared Testament'" paper read for peer review at the semi-annual of the Christian Scholars Group of the Institute for

Christian and Jewish Studies, Baltimore, April 20, 2001.

- "Education for Religious Particularism and Pluralism: Theological Perspectives," annual meeting of the Association of Professors and Researchers in Religious Education, Toronto, Canada, October 16, 1999.
- "Reflections on Religious Pluralism as Regards Roman Catholicism" for the Education for Religious Particularism and Pluralism project, sponsored by the Lilly Endowment's Valparaiso Project on the Education and Formation of People in Faith, May 2, 1999, White Plains, NY.
- "Toward Educational Guidelines: Colleges, Universities, and Seminaries" (with Ruth Langer) at *Teaching About the Shoah*, co-sponsored in February 1999 by the Archdiocese of Baltimore, the American Jewish Committee, and the National Conference of Catholic Bishops. This text became the basis for guidelines issued in 2001 by the Secretariat for Ecumenical and Interreligious Affairs, N.C.C.B. entitled, *Catholic Teaching the Shoah: Implementing the Holy See's* We Remember.
- "How Does the Unique Relationship Between Judaism and Christianity Impact the Effort to Educate for Both Particularism and Pluralism?" for the Education for Religious Particularism and Pluralism project, sponsored by the Lilly Endowment's Valparaiso Project on the Education and Formation of People in Faith, May 4, 1998, White Plains, NY.
- "Jews and Judaism in U.S. Catholic Religious Education," a paper and multimedia program presented at the 16th meeting of the International Catholic-Jewish Liaison Committee, March 23-26, 1998, Vatican City.
- "Testamental Terminology," for the Continuing Seminar on Biblical Issues in Jewish-Christian Relations, Annual Meeting of the Catholic Biblical Association of America, August 12, 1997, Seattle, WA.

- "Romans 9-11 and the Modern Jewish and Catholic Dialogue: An Experiment Using the Hermeneutics of Sandra Schneiders," Meeting of the Catholic Biblical Association, Aug 13, 1995, Loudonville, NY.

Professional Memberships

- The Catholic Biblical Association of America
- The Christian Scholars Group on Christian-Jewish Relations
- Advisory Committee on Catholic-Jewish Relations for the Secretariat for Ecumenical and Interreligious Affairs of the U.S. Conference of Catholic Bishops
- Advisory Council of Relation and Encounter, the interfaith initiative of the Sisters of Our Lady of Sion, USA/Canada
- The Jewish-Christian Interfaith Partnership of New Hampshire (1992-)
- Board of Directors, NH Conference of Religious Educators (1991-2000)
- Board of Directors, The New Hampshire Bible Society (1994-2000)
- Christian-Jewish Dialogue of Massachusetts Council of Churches (2000-)

Professional Activities

- Invited to prepare paper for consultation of the International Council of Christians and Jews and World Council of Churches, London, England, December 9-10, 2004; topic: "Primary Themes in Catholic Documents on Jews and Judaism."
- Invited writer for a revision of *Within Context: Jews and Judaism in Catholic Teaching Materials,* co-sponsored by the Anti-Defamation League and the Bishops Committee on Ecumenical and Interreligious Affairs, USCCB, Nov. 2001 to the present.

- Invited participant in a consulation on the Pontifical Biblical Commission's study *The Jewish People and Their Sacred Scriptures in the Christian Bible* sponsored by the Pope John Paul II Intercultural Center, Washington, D.C., Oct. 24, 2002.
- Invited participant in interfaith dialogue on the Pontifical Biblical Commission's study *The Jewish People and Their Sacred Scriptures in the Christian Bible* sponsored by the Rabbinic Committee for Interreligious Consultation, Washington, D.C., May 7, 2002.
- Invited to private consultation with Cardinal Walter Kasper on Catholic-Jewish Relations, Catholic Theological Union, Chicago, April 17, 2002.
- Authored address in commemoration of Yom Hashoah delivered by Most Rev. John McCormack, Bishop of Manchester, April 8, 2002.
- Acting Secretary for the Bishops' Committee on Ecumenical and Interreligious Affairs – National Council of Synagogues Consultation, March 2002 – May 2002.
- Secretary for organizational meeting of the Council of Center on Jewish-Christian Relations, New York City, October 28-29, 2001.
- Member of the delegation representing the Pontifical Commission for Religious Relations with the Jews at the 17th meeting of the International Catholic-Jewish Liaison Committee, New York, April 30-May 4, 2001.
- Invited consultant at "Jews and Christians in Conversation: A Cross-Generational Conference," Cambridge University, U.K., co-sponsored by the Centre for Jewish-Christian Relations at Cambridge University, the Cardinal Bernardin Center, Chicago, and the Tanenbaum Center for Interreligious Understanding, New York, March 25-27, 2001.
- At the request of the Vatican Secretariat of State, served in the Holy See's Delegation to "The Stockholm

International Forum on the Holocaust," Stockholm, Sweden, January 26-28, 2000.

- Co-Developer and consultant on Proposal for the Center for Christian-Jewish Learning at Boston College; 1997-2000.
- Member of the "Education for Religious Particularism and Pluralism" project, sponsored by the Lilly Endowment's Valparaiso Project on the Education and Formation of People in Faith, directed by Drs. Mary C. Boys and Sara Lee, 1997-2000.
- Manuscript reviewer, *Journal of Ecumenical Studies*, 1997-present.
- Co-Convener, with Dr. John Clabeaux, of the Continuing Seminar on Biblical Issues in Jewish-Christian Relations, Catholic Biblical Association of America, 1996-present.
- Designed and maintained World Wide Web site for The Ministry Institute, Notre Dame College, Manchester, NH, 1997-2000.
- Scholar-in-residence for biannual interfaith study-tours to Israel and Jordan, 1994, 1996, 1998; the latter trip included the posting of daily lectures, summaries, and photographs to the Shalom Center website for family members and interested persons back home.

Administrative Positions

- Director of The Ministry Institute, Notre Dame College, Manchester, NH, 1991-2000; Designed and directed Master of Arts in Theology program; oversaw ongoing formation of ministerial personnel including permanent deacons through the Ministry Foundations program, Weekend Workshops, and Theological Roundtables.
- Co-Director, with Rabbi Arthur Starr, of The Shalom Center for Understanding Between Christians and

Jews, Notre Dame College, Manchester, NH, 1994-1999; established center, organized conferences, workshops, and courses, led and lectured on interfaith study-tours to Israel and Jordan, and designed and edited a six-week curriculum for local interfaith dialogue, *Sharing Shalom*.

College Activities

- Member, Jesuit Institute Seminar on Jewish-Christian Relations, 2000-present
- Member, Boston College September 11 Response Committee, fall 2001.
- Chair, Faculty Development Committee, 1992-1995
- Member, Search Committee for Academic Vice-President, 1994
- Chair, College position paper on Ex Corde Ecclesiae, 1993-1994
- Chair, Ad Hoc Committee on Academic Computing, 1996-1997
- Member, Faculty Affairs Committee, 1996-present; member, sub-committee on faculty promotion.

Lectures for academic institutions, national agencies, or interfaith organizations

- Panelist-respondent to lectures by Raymond E. Brown entitled, "The Bible in Our Faith and Practice," 20th Anniversary of the Institute of Religious Education and Pastoral Ministry, Boston College, July 23-25, 1991.
- "An Overview of the Jewish and Christian Encounter," keynote launching the Jewish Christian Coalition of New Hampshire, sponsored by the NH Council of Churches and NH Jewish Congregations, May 27, 1992.

- "The Catholic Perspective on Jews and Judaism as Seen in Catholic School Curricula," panelist, the Second Annual Salzberg Conference on Anti-Semitism, Brandeis University, Waltham, MA, November 6, 1992.
- "The Dead Sea Scrolls," daylong workshop, Notre Dame College, Manchester, NH, October 30, 1993.
- "Romans 9-11 and Modern Jewish-Catholic Relations," public interfaith dialogue with Rabbi Leon Klenicki, Notre Dame College, Manchester, NH, March 14, 1994.
- "The *Catechism of the Catholic Church*: First Impressions," theological roundtable, Notre Dame College, Manchester, NH, October 22, 1994.
- "The Portrayal of Jews and Judaism in Christian Educational Materials," "Introduction to Interfaith Dialogue," panelist; and "How Are We Similar? How Are We Different? Where Do We Meet?" panelist; National Workshop on Christian-Jewish Relations, Tulsa, OK, Nov. 5-9, 1994.
- "Jews and Judaism in the *Catechism of the Catholic Church*," Catholic-Jewish Relations Committee of the Archdiocese of Boston, Newton, MA, December 12, 1994.
- "The Origins of Anti-Jewish speech in the New Testament" at the 30th Anniversary Celebration of *Nostra Aetate* co-sponsored by the Archdiocese of Atlanta and the American Jewish Committee, Atlanta chapter, Atlanta, Georgia, June 20, 1995.
- "Thirty Years Since Nostra Aetate," a public interfaith dialogue with Rabbi Leon Klenicki, Diocese of Norwich, Norwich, CT, Dec. 3, 1995.
- "Christian-Jewish Relations in the Late 20th Century," Ecumenical Institute of New England, Peterborough, NH, May 17, 1996.
- "How Local Centers for Christian-Jewish Understanding Began and Developed," panelist, also responded to paper read by Dr. Michael Kogan entitled, "Affirming

the Other's Theology: How Far Can Jews and Christians Go?" 15th National Workshop on Christian-Jewish Relations, Stamford, CT, October 27-30, 1996,

- "Paul and the Law of Moses," at *The Apostle Paul: His Message for Today* conference, NH Bible Society and Notre Dame College, Manchester, NH, November 16, 1996.
- "Proclaiming Shalom: Building Bridges and Avoiding Pitfalls When Referring to Jews and Judaism in Christian Worship," Center for the Study of Jewish-Christian Relations, Merrimack College, North Andover, MA, Mar. 12, 1997.
- "Catholic Religious Education on Jews and Judaism," multimedia presentation at an interfaith consultation on *Teaching About the Other* sponsored jointly by the Interreligious Coordinating Council of Israel, the National Council of Synagogues, and the National Conference of Catholic Bishops, New York City, NY, March 18, 1997.
- "Challenges of Implementation," multimedia presentation, conference on *Faith for the Future: The Practical Implications of Teaching and Preaching in the Light of the Jewish-Christian Encounter*, The Institute for Christian and Jewish Studies, Baltimore, MD, May 14, 1997.
- "The Life and Death of Jesus: New Insights into His Historical and Social Context," multimedia presentations at *The Scriptures and the Scrolls* conference, NH Bible Society and Notre Dame College, Manchester, NH, November 7-8, 1997.
- "The Advent Lectionary and Its Use of the Scriptures of Ancient Israel," multimedia presentation, Stonehill College, North Easton, MA, November 12, 1997.
- "Is the Christian Bible Anti-Semitic?", multimedia presentation, Stonehill College, North Easton, MA, November 12, 1997.

- "What is the Teaching of Contempt?;" "A Renunciation that Transforms;" "Religion Textbooks on Jews and Judaism;" and "Jews and Judaism in the Lectionary," four multimedia presentations, *Beyond the Teaching of Contempt: Practical Resources for the Church* conference, Andover Newton Theological School, Newton, MA, January 28, 1998.
- "Catholic Religious Education on Jews and Judaism," multimedia presentation, Connecticut Council of Churches and Synagogues, Stamford, CT., March 8, 1998.
- "The Vatican and the Jews," daylong multimedia workshop, Notre Dame College, April 17, 1998.
- "The Vatican's 1998 Statement on the Holocaust," The Center for the Study of Religion in Public Life, Trinity College, Hartford, CT, May 6, 1998.
- "The Importance of Historical Jesus Research for Jewish-Christian Relations – A Catholic Perspective," multimedia presentation, The Center for Christian-Jewish Dialogue, Colorado Springs, CO, May 17-18, 1998.
- "The Renewal in Relations Between Christians and Jews and Its Contribution to Global Interreligious Understanding," Nashua Area Interfaith Council, Cathedral of the Pines, Rindge, NH, September 13, 1998.
- "Telling the Christian Story in a Post-Supersessionist Church," multimedia presentation, Notre Dame College Faculty Forum, October 21, 1998.
- Participant in panel discussion on "Civility in Public Debate," sponsored by The Interfaith Alliance Foundation, Manchester, NH, February 4, 1999.
- "Toward Education Guidelines for Shoah Education – Colleges, Universities, and Seminaries," with Rabbi Dr. Ruth Langer as part of an invitational consultation co-sponsored by the National Conference of Catholic

Bishops and the American Jewish Committee, Baltimore, February 16-17, 1999.

- "Telling the Christian Story in a Post-Supersessionist Church," multimedia presentation, Center for the Study of the Jewish and Christian Relationship, Boston College, Chestnut Hill, MA, March 15, 1999.
- "Interpreting the 'Old Testament' as a 'Shared Testament'" and "Telling the Christian Story in a Church that Affirms God's Covenant with Israel," two multimedia presentations at the 16th National Workshop on Christian-Jewish Relations, Houston, Texas, October 25 and 26, 1999.
- "A History of Christian Interpretation of the Bible," opening address of workshop entitled, "The Bible and the Churches, Notre Dame College, November 12, 1999.
- "The Theological Contributions of Pope John Paul II to Catholic-Jewish Relations," St. Leo's University, Tampa, FL, February 23, 2000.
- "Creating the Other: Anti-Judaism and Antisemitism," for Facing History and Ourselves, Simmons College, August 15, 2000.
- "Introducing *Catholic Teaching on the Shoah*" semi-annual meeting of the Catholic-Jewish Consultation Committee, consisting of representatives of the National Conference of Catholic Bishops and the National Council of Synagogues, New York, April 17, 2001.
- Panelist responding to James Carroll's presentation on his book, *Constantine's Sword: The Church and the Jews: A History*, Boston College, April 26, 2001.
- "Sharing Shalom: The Ongoing Catholic Reform in Preaching and Teaching about Jews and Judaism and Pope John Paul II's Contributions to It", spring workshop for the Institute of Religious Education and Pastoral Ministry, Boston College, April 28, 2001.

- "A Story of Shalom," Boisi Center, Boston College, October 10, 2001.
- Respondent to Yaffa Eliach, keynoter at *Honoring Faith: Respecting Each Other – Jewish and Christian Educational Tasks After the Holocaust,* Andover Newton Theological School and Hebrew College, Newton, MA, November 4, 2001.
- "Do Christians and Jews Worship the Same God?" with Jan Katzew, annual *Nostra Aetate* lecture, Fordham University, New York, November 8, 2001.
- "A Story of Shalom," Notre Dame College, Manchester, NH, Dec. 3, 2001.
- "Telling the Christian Story Anew," Mobile Region Christian-Jewish Dialogue, Mobile, AL, January 10, 2002
- "Telling the Christian Story Anew," Center for Catholic-Jewish Studies, St. Leo's University, St. Leo, Florida, March 4, 2002.
- "We Really Do Remember: The Shoah and Catholic-Jewish Relations," National Association of Diocesan Ecumenical Officers, Cleveland, OH, May 21, 2002.
- Panel Discussion on my *A Story of Shalom: The Calling of Christians and Jews by a Covenanting God*, Jewish-Christian Interfatih Partnership of New Hampshire, Manchester, NH, April 14, 2002.
- "'Reflections on Covenant and Mission' and 'A Sacred Obligation,'" for the comparative theology lunch series, Boston College, Oct. 16, 2002.
- "The Trinity and Christian Jewish Relations," Regis College Ministry Institute, Manchester, NH, Nov. 12, 2002.
- "Ethical Issues in Christian-Jewish Relations, with Ruth Langer, Boston College Theology Dept. Ethics Seminar, Dec. 6, 2002.

- "Telling the Christian Story in a Post-Supersessionist Church," St. Vincent Seminary, Boynton Beach, FL, Feb. 28, 2003.
- "Recognizing Each Other's Religious Legitimacy: How Far Can We Go?," response to Rabbi Eugene Korn, Boston College, Mar. 13, 2003.
- Changing Our Hearts: The Renewal in Catholic-Jewish Relations and Parish Life," St. Mary Seminary, Cleveland, OH, Mar. 20, 2003.
- "The Catholic Church and the Jews: A Conversion from Contempt to Fellowship," Brandeis University, Apr. 8, 2003.
- "A Legacy of Ambivalence: Jewish-Catholic Relations in Retrospect," Hebrew College, May 1, 2003.
- Response to Meir Y. Soloveitchik, "The Virtue of Hate," for the American Jewish Committee and Massachusetts Council of Churches Christian-Jewish Dialogue, May 28, 2003.
- "The Catholic Reform Toward Jews: Past Progress, Current Conflicts, Future Trends," Wellesley College, May 30, 2003.
- "Issues in Christian-Jewish Relations" (with Ruth Langer), Gralla Journalism Institute, Brandeis University, July 23, 2003.
- "Dynamics of Interreligious Dialogue: Some Cues from the Christian-Jewish Experience," Interfaith Ministries for Greater Houston, October 9, 2003.
- "Catholic Religion Textbooks on Jews and Judaism," National Catholic Center for Holocaust Education, Seton Hill University, Greensburg. PA, Nov. 8, 2003.
- "The Gospels: Christian Theologies of Judaism, and Antisemitism," Boston College, Jan. 25, 2004.
- "The Arrest and Sentencing of Jesus: A Historical Reconstruction," Creighton University, Omaha, NE, Jan. 29, 2004.

- "*The Passion of the Christ* and Interfaith Relations," panel, Jewish Council for Public Affairs 2004 National Plenum, Boston, MA, Feb. 21, 2004.
- "Gibson's *The Passion of the Christ*," 2004 Charlotte B. and Jack J. Spitzer B'nai B'rith Spitzer Forum for Public Policy, Boston, MA., Feb. 23, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Brandeis University (panel), Waltham, MA., Mar. 9, 2004.
- "Catholic Biblical Perspectives on Judaism and the Jewish People," *Fifth Annual Driscoll Lecture in Jewish-Catholic Studies*, Iona College, New Rochelle, NY, Mar. 10, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Comparative Theology luncheon, Boston College, Mar. 25, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Boston College Jewish Law Students Association and Boston College Law School St. Thomas More Society, Newton, MA, Apr. 22, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," (panel) Anti-Defamation League annual national meeting, Washington, D.C., May 3, 2004.
- "Jewish-Christian Relations" (with Ruth Langer), 2004 Gralla Fellows Program for Religion Journalists, Brandeis University, Waltham, MA., July 11, 2004.
- "A History of the Christian Teaching of Contempt for Jews and Judaism," Facing History and Ourselves Foundation, Brookline, MA., July 13, 2004.
- "One Catholic's Reflections on Jewish Discussions of the Religious Status of Gentiles and Christianity (Especially Regarding the Noahide Laws, *Avodah Zarah*, and *Shituf*)," Harvard University, Cambridge, MA., July 29, 2004.

- "Jewish-Catholic Relations: Accomplishments and Challenges," Rabbi Martin Silverman Lecture, College of St. Rose, Albany, NY, Sept. 19, 2004.
- "The Motif of Synagogue and Church in Christian Art," panel presentation as part of the Boston Public Library's restoration of the art of John Singer Sargent, Boston, Oct. 18, 2004.
- "Partners in Covenant," panel response to Irving Greenberg's *For the Sake of Heaven and Earth: The New Encounter between Judaism and Christianity*, Boston College, Oct. 19, 2004.

Lectures for church or synagogue groups

- "Approaches to Religious Education," keynote, Keene Deanery Catechetical Day, Jaffrey, NH, September 28, 1991.
- "What We Catholics Think About You Jews," Temple Adath Yeshurun, Manchester, NH, November 17, 1991.
- "Acts of the Apostles," three two-hour classes for Salem Christian Life Center, St. Patrick Parish, Pelham, NH, January 14, 28, February 4, 1992.
- "Intending Faith: Toward a Vision for Religious Education," with Dr. Michael Corso, Laconia Christian Life Center, Laconia, NH, September 19, 1992.
- "An Introduction to the Old Testament," Sacred Heart Parish, Amesbury, MA, February 10, 1993.
- "An Introduction to the New Testament," Sacred Heart Parish, Amesbury, MA, February 17, 1993.
- "Responses to Questions About Christianity," Hebrew class, Temple Ahavas Achim, Keene, NH, March 10, 1993.
- "The Origins of the Christian Anti-Jewish Tradition," St. Michael Episcopal Church, Brattleboro, VT, March 10, 1993.

- "The Origins of Christianity," guest speaker in "World Religions" course, University of New Hampshire, Manchester, NH, April 13, 1993.
- "The Role of Eve in the Yahwist's Creation Account," Women's Spirituality Group, Rye, NH, April 19, 1993.
- "Called to a Faith That Transforms," keynote address at St. Mark's/St. Jude's Ministry Enrichment Day, Londonderry, NH, September 11, 1993.
- "Making the Mission of Jesus Our Own," keynote address, Laconia Christian Life Center, Laconia, NH, September 25, 1993.
- "Lifting Up a Biblical Vision of Reality," keynote, Annual Meeting of the NH Bible Society, Concord, NH October 8, 1993.
- "The Origins of the Christian Anti-Jewish Tradition," Unitarian-Universalist Ministerial Association, Charlestown, NH, November 2, 1993.
- "The Letters of Paul," St. Thomas Aquinas Church, Derry, NH, Nov. 16, 1993.
- "Matthew's Infancy Narrative," Notre Dame College Advent luncheon, Manchester, NH. November 29, 1993.
- "Luke's Infancy Narrative," Notre Dame College Advent luncheon, Manchester, NH. December 6, 1993.
- "The Ministry of Jesus and Its Portrayal in the Synoptic Gospels," St. George Manor, Manchester, NH, February 19, 1994.
- "The Passion Narratives," Notre Dame College Lenten luncheon, Manchester, NH, February 25, 1994.
- "Exodus 20-24," St. John Neumann Parish bible study, Merrimack, NH, March 16, 1994.
- "The Origins of Christianity," guest speaker in "World Religions" course, University of New Hampshire, Concord, NH, April 6, 1994.

- "An introduction to the *Catechism of the Catholic Church,*" daylong workshop, Laconia Christian Life Center, Laconia, NH, September 10, 1994.
- "The Deuteronomic Tradition," Bedford Presbyterian Church adult education, Bedford, NH, September 25, 1994.
- "Principles for Good Bible Study," with Rev. David Doyle, Annual Meeting of the NH Bible Society, Concord, NH, October 5, 1994.
- "Introduction to the *Catechism of the Catholic Church*," with Barbara Radtke, Manchester *Barnes and Nobles*, Manchester, NH, November 14, 1994.
- "The Prophets Isaiah: Advent of a New Creation," Notre Dame College Advent luncheon, Manchester, NH, December 5, 1994.
- "The *Catechism of the Catholic Church,*" Our Lady of Fatima parish, New London, NH. January 15, 1995.
- "The Gospel of Matthew," Bedford Presbyterian Church adult education, Bedford, NH, January 29, 1995.
- "The Consequences of Reading the Bible Critically," St. Catherine Parish, Manchester, NH, February 14, 1995.
- "Issues in Jewish and Catholic Relations," Temple Adath Yeshurun, Manchester, NH, March 17-19, 1995.
- "Acts 9-12," St. John the Evangelist Parish bible study, Concord, NH, March 27, 1995.
- "The Message of John 11," reflections for the Scrutinies ritual of the RCIA program, St. Thomas More Church, Durham, NH, March 31, 1995.
- "The Meaning and Method of Ministry," St. Charles Parish, Meredith, NH, September 9, 1995.
- "Mark 8-12," St. Marie Parish adult bible study, Manchester, NH, September 24, 1995.
- "The Origins and Effects of New Testament Anti-Jewish Polemic," Manchester Central High School, Manchester, NH, September 26, 1995.

- "Mary in the New Testament," St. Joseph Parish, Hinsdale, NH, Oct 15, 1995.
- "The Many New Testament Understandings of Church," Bedford Presbyterian Church, Bedford, NH, October 29, 1995.
- "The God of Israel and the Coming Reign: The Torah, Jesus, and Us," Nashua Deanery meeting, Nashua, NH, November 8, 1995.
- "Introduction to the Bible," St. John the Evangelist Parish RCIA, Concord, NH, November 16, 1995.
- "The Letter to the Galatians," St. Marie Parish adult bible study, Manchester, NH, February 11, 1996.
- "The Purposes of State Bible Societies," panelist, Meeting of the Board of Directors of the NH Bible Society, Concord, NH, February 16, 1996.
- "The Mystery of Suffering," Notre Dame College Lenten luncheon, Manchester, NH, March 6, 1996.
- "English Translations of the Bible," St. Marie Parish, Manchester, NH, March 10, 1996.
- "Encountering the Gospel Writers Through Their Passion Narratives," Our Lady of Fatima Parish, New London, NH, March 18, 1996.
- "Passover and Easter," television discussion program, WMUR-TV, Manchester, NH, April 7, 1996.
- "Are All Christians Ministers?" Nashua Deanery meeting, Nashua, NH, April 16, 1996.
- "Introduction to the Book of Revelation," St. Thomas Aquinas Parish, Derry, NH, May 28, 1996.
- "Great Themes of the Hebrew Bible: Covenant," St. Joseph Church, Epping, NH, October 1, 1996.
- "The Apostle Paul: His Message for Today," with Rev. Dr. David Doyle, Annual Meeting of the NH Bible Society, Concord, NH, Oct. 15, 1996.
- "The Origins of the Gospel of Mark," Notre Dame College, Manchester, NH, February 15, 1997.

- "Eschatology over the Centuries," St. Patrick Church RCIA, Milford, NH, February 19, 1997.
- "The History of the Modern State of Israel," First Congregational Church (U.C.C.), Wolfeboro, NH, February 23, 1997.
- "Growing as Leaders in Religious Education," panelist, NH Conference of Religious Educators, St. Raphael Church, Manchester, NH, March 19, 1997.
- "The Book of Exodus as the Heart of Hebrew Spirituality," St. Theresa Parish, Rye, NH, April 22, 1997.
- "Ministry in the New Testament Churches: Norms for Ministry Today," multimedia presentation, Laconia Christian Life Center, Laconia, NH, October 18, 1997
- "The Modern State of Israel: An Overview of Its History," multimedia presentation, Shalom Center, Manchester, NH, October 19, 1997.
- "The Death of Jesus as Portrayed in the Gospels," Bishop Guertin High School, Nashua, NH, October 20, 1997.
- "An Overview of Hebrew History," multimedia presentation, The Shalom Center, Manchester, NH, November 16, 1997.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part One, "Separations," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, November 19, 1997.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Two, "Rivals," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, December 10, 1997.
- "The Infancy Narratives of Luke and Matthew," multimedia presentation, Our Lady of Fatima Parish, New London, NH, December 15, 1997.

- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Three, "Dominance and Marginalization," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, March 12, 1998.
- "The Passion Narratives and the Death of Jesus," multimedia presentation, St. Theresa Church, Weston, MA, March 15, 1998.
- "Christ's Passover – Early Christian Reflection on the Life and Death of Jesus," multimedia presentation, Notre Dame College, April 1, 1998.
- "The Gospel of Matthew, chapters 8-16," St. Marie Parish adult Bible study, Manchester, NH., April 26, 1998.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Four, "Emancipation and Oppression," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, April 29, 1998.
- "Jews and Christians for Two Millennia: Rivals, Foes, and Friends," Part Five, "Allies," multimedia presentation, Temple Adath Yeshurun, Manchester, NH, May 20, 1998.
- "Telling the Christian Story in a Post-Supersessionist Church," multimedia presentations, Manchester Clergy Association, September 3, 1998.
- "Communion Requires Community," Our Lady of Fatima Church, New London, NH, October 25, 1998.
- "Preparing for Jubilee 2000," St. Joseph Men's Breakfast, Salem, NH, October 31, 1998.
- "Getting to Know the Gospel of Mark," St. Mary Magdalene Church, Tyngsborough, MA, January 11, 1999.
- "Ecumenical and Interreligious Aspects of Jubilee 2000," with Dr. Barbara Radtke. Diocese of Manchester Ecumenical and Interreligious Commission, Concord, NH, January 23, 1999.

- "Preparing for Jubilee 2000," St. Patrick Parish, Pelham, NH, Feb 21, 1999.
- "Jewish and Christian Approaches to Afterlife," Corpus Christi Church, Newton, MA, March 21, 1999.
- "Jews and Christians: History of a Love – Hate Relationship," Part One, "Separations." Multimedia presentation. Nashua Area Interfaith Council. Nashua, NH, March 21, 1999.
- "Jews and Christians: History of a Love – Hate Relationship," Part Two, "The Christian Teaching of Contempt for Jews and Judaism." Multimedia presentation. Nashua Area Interfaith Council. Nashua, NH, March 28, 1999.
- "Jews and Christians: History of a Love – Hate Relationship," Part Three, "The Modern Church's Renunciation of Anti-Judaism." Multimedia presentation. Nashua Area Interfaith Council. Nashua, NH, April 11 1999.
- "A New Path: The Recent Reform of Christian Teachings About Jews and Judaism," Temple Isaiah, Lexington, MA, April 5, 1999.
- "A New Path: The Recent Reform of Christian Teachings About Jews and Judaism," Temple Emanu-El, Haverhill, MA, April 21, 1999.
- "The Teaching of Contempt and the Implications of Its Renunciation," Multimedia lecture. Baltimore Jewish Council, Baltimore, MD, May 7, 1999.
- "The Acts of the Apostles," St. Mary Magdalen Church, Tyngsborough, MA, June 14, 1999.
- "The Teaching of Contempt and the Implications of Its Renunciation," Mulitmedia Presentation. Baltimore Jewish Council, Baltimore, MD, June 24, 1999.
- "The Catholic Approach to the Bible," videotaped presentation for the Diocese of Manchester, St. Joseph Cathedral, Manchester, NH, September 8, 1999.

- "Our Elder Brothers: Recent Catholic Teaching on Catholic-Jewish Relations," Keene Deanery Christian Life Center, Jaffrey, NH, Sept 11, 1999.
- "The Jewishness of Jesus: Implications for Preaching and Teaching," five multimedia presentations for the annual Manchester Clergy Institute, Hampton Beach, NH, September 15-17, 1999.
- "The Teaching of Contempt and the Implications of Its Renunciation," multimedia presentation, St. Thomas More Church, Baltimore, MD, September 18, 1999.
- "The Hebrew Prophets and Their Importance for Jubilee 2000," St. Joseph Cathedral, Manchester, NH, October 19, 1999.
- "Different Christian Understandings of Biblical Authority" and "The Great Jubilee of the Year 2000," presentations for the Berlin ministerium, Berlin, NH, January 7, 2000.
- "Recent Developments in Catholic-Jewish Relations Internationally," Temple Adath Yeshurun, Manchester, NH January 30, 2000.
- "Speaking the 'Truth of the Gospel' When Teaching About Jews and Judaism," Dept. of Catholic Schools and Office of Catechesis, Diocese of Manchester, Auburn, NH, March 22, 2000.
- "Christians and Jews Since the Shoah: Past Encounters, Present Issues, and Future Hopes" with Rabbi Dr. Ruth Langer, Yom HaShoah Memorial Program, Rivier College, Nashua, NH, May 2, 2000.
- "The Social World of Jesus," First Church Congregational – UCC, Nashua, NH, October 15, 2000
- "The *Shoah* and Catholic Education," St. Anselm College, Manchester, NH, November 5, 2000.
- "The Christian Teaching of Contempt for Jews and Judaism and the Implications of Its Modern Renunciation," Notre Dame College, Manchester, NH, November 9, 2000.

- "Four Gospel Portraits of Jesus," Our Lady of the Miraculous Medal Parish, Hampton, NH, January 22 and 29, 2001.
- Panelist responding to James Carroll's presentation on his book, *Constantine's Sword: The Church and the Jews: A History*, Temple Beth Elohim, Wellesley, MA, April 2, 2001.
- "Jesus and the Torah's Social Ethic," Our Lady of the Miraculous Medal Parish, Hampton, NH, April 23, 2001.
- "An Overview of Catholic-Jewish Relations Today," Yom Kippur service at Temple Beth Shalom, Needham, MA, September 27, 2001.
- Respondent to David Ketrzer, author of *The Popes Against the Jews*, Newton Free Library, Newton, MA, October 18, 2001.
- "The Current Status of Catholic-Jewish Relations," Our Lady of Good Counsel Parish, Sharon, MA, April 4, 2002.
- "The Flowering of Catholic-Jewish Relations, Boston College Alumni Association, April 29, 2002.
- "New Horizons in Christian-Jewish Relations," Lasell Village, Auburndale, MA, May 10, 2002.
- "Developing New Reflexes: Implementing Our New Paradigm of Jews and Judaism," Archdiocese of Boston Pastoral Institute, Waltham, MA, June 11, 2002.
- "Covenant and Eucharist," Dover Catechetical Day, Dover, NH. Sept. 28, 2002.
- "Being Catholic in Difficult Times," panelist with Patricia DeLeeuw, St. Malachy Parish, Burlington, MA, Oct. 18, 2002.
- "This is the Covenant in My Blood," Laconia Deanery Christian Life Center, Laconia, NH, Oct. 20, 2002.

- "Update on Recent Developments in Catholic-Jewish Relations," Boston Archdiocese Office of Ecumenical and Interreligious Affairs, Nov. 21, 2002.
- "The Current Ecumenical and Interreligious Landscape: A Vatican Perspective with Comments on the United States Context," Diocese of Manchester, Parish Ecumenical Training Workship, Concord, NH, Jan. 11, 2003.
- "Catholics and Jews: Teaching About the Other," Annual Catholic-Jewish Colloquium, Temple Beth El, St. Joan of Arc Church, and the American Jewish Committee, Boca Raton, FL, Feb. 27, 2003.
- "A Catholic Interpretation of a *Tanakh* Text," Temple Beth El, Boca Raton, FL, March 1, 2003.
- "What We Teach Our Children: Misconceptions in Jewish and Catholic Classrooms," Diocese of Cleveland and Anti-Defamation League Educator's Workshop, Cleveland, OH, Mar. 19, 2003.
- "Catholic Biblical Perspectives on Judaism and the Jewish People," 17th Annual Jewish-Catholic Colloquium keynote address, Diocese of Cleveland and the Anti-Defamation League, Cleveland, OH, Mar. 20, 2003.
- "Problems with Mel Gibson's *The Passion*," American Jewish Committee New England Chapter Board Meeting, October 2, 2003.
- "The Christian Renunciation of Supersessionism," Etz Hayim Synagogue and Episcopalian Church of the Transfiguration, Derry, NH, Jan. 12, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Temple Kehillath Israel, Brookline, MA, Feb. 28, 2004.
- "The Impact of Gibson's *The Passion of the Christ*," New England Anti-Defamation League, Boston, MA, Mar. 2, 2004.

- "The Partings of the Ways of Judaism and Christianity," Immaculate Heart of Mary Parish, Scarsdale, NY, Mar. 10, 2004.
- "The Modern Church's Renunciation of Anti-Judaism and Supersessionism: A Transformation in Christian Teaching," New Hampshire Episcopal clergy workshop, Hopkinton, NH, Mar. 18, 2004.
- "Interfaith Dialogue on *The Passion of the Christ*," Temple Israel and Trinity Church, Boston, MA, Mar. 18, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Temple Beth Shalom, Needham, MA, Mar. 19, 2004.
- "Encountering Jesus in the Gospel Passion Narratives," St. Malachy Parish, Burlington, MA, Mar. 21, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Jewish Federation of Greater Manchester, Manchester, NH, Mar. 31, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Temple Ohabei Shalom, Brookline, MA, Apr. 2, 2004.
- "Gibson's *The Passion of the Christ*," St. Ignatius Parish, Chestnut Hill, MA, Apr. 4, 2004.
- "Religious Education and Catholic-Jewish Relations," Diocese of Venice, FL, Apr. 25, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," American Jewish Committee, Boston, May 13, 2004.
- "*The Passion of the Christ* and Jewish-Christian Relations," Temple Etz Hayyim, Cambridge, MA, May 23, 2004.

Media Interviews

- "Jewish-Catholic Relations," radio discussion program, WNHQ, Milford, NH, September 28, 1994.
- Radio interview on "The History of Christmas Observances," *The Exchange*, NH Public Radio, Concord, NH, December 24, 1996.
- "Teaching Ethics in Public Schools," Radio show panelist, WGIR Radio, Manchester, NH, April 28, 1997.
- "The Protocols of the Elders of Zion Revisited," *Here and Now*, WBUR Boston Public Radio, Oct. 31, 2001.
- Interviews regarding the release of *A Sacred Obligation: Rethinking Christian Faith in Relation to Judaism and the Jewish People* by the Christian Scholars Group on Christian-Jewish Relations with *Boston Globe*, *Boston Herald*, *Religion News Service*, Sept. 2002.
- "Passion Plays in Christian History," *The Connection*, WBUR Boston Public Radio, Boston, MA, Feb. 9, 2004.
- "Mel Gibson's *The Passion of the Christ*," *Primetime Event with Diane Sawyer*, ABC News, Feb. 12, 2004.
- "Mel Gibson's The Passion of the Christ," *News Night*, New England Cable News, Feb. 20, 2004
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Supreme Court, U.S.
FILED
DEC 15 2004
OFFICE OF THE CLERK

No. 03-1500

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

vs.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* ATHEIST LAW CENTER *et al.*, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Atheist Law Center, which coordinated representation of all *amici* here, is a nonprofit Alabama corporation whose mission is educational and legal advocacy on behalf of citizens who espouse no religious belief. When Alabama Chief Justice Roy Moore erected a 5,280-pound granite Decalogue in the rotunda of the Alabama Judicial Building and indicated that doing so was homage to the foundations of American law, the Center requested to display a model of an atom to symbolize the contributions of rationality and Enlightenment philosophy to American law and was refused. The Center is joined by Alabama *amici* Pat Cleveland, past president of the Alabama Freethought Association, who was involved in 1990s federal and state cases challenging then-circuit judge Roy Moore's sectarian courtroom prayer and Decalogue display over the judicial bench; Michael Chandler, a DeKalb County Baptist, parent, and school administrator who challenged Alabama's fourth school-prayer statute enacted within a fifteen-year period; and Wayne and Sue Willis, Jewish parents who challenged religious harassment and Establishment Clause violations in rural Pike County, where their children were the only

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk.

Jews in the school system.[2]

Other Alabama *amici*, who have followed with alarm Alabama's several well-publicized theocratic flirtations over the past decade, are the United Universists and the Birmingham Atheists (formed in response to Chief Justice Roy Moore's installation of the granite Decalogue). *Amici* Dallas-Fort Worth Metroplex Atheists, North Texas Church of Freethought in Dallas, Texas, and Camp Quest (a Kentucky corporation that runs an atheist summer camp) have a particular interest in this case since Decalogue cases from their home states simultaneously pend here; Metroplex Atheists and North Texas Church of Freethought members have a direct concern about the government property in this very case.

These *amici* are joined by Scouting for All, which seeks to influence the Boy Scouts of America (BSA) to stop discriminating on the basis of spiritual beliefs or sexual orientation; Rob Sherman Advocacy of Chicago, Illinois, whose founder has challenged BSA's religious oath and discrimination against atheists; Atlanta Freethought Society; Unitarian Universalist Infidels; East Bay Atheists (San Francisco); Atheist Station (Altoona,

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[2] These plaintiffs, who were represented by counsel of record here, experienced community harassment that variously included death threats, vandalism, and ostracism. Cleveland received suspicious mail that necessitated law enforcement use of water cannons; Chandler and his wife, also a teacher in DeKalb County, were hounded into early retirement and their son endured taunting; the Willis family's children suffered assaults, offensive graffiti, taunts, and forced participation in Christian activities before the family decided to leave Alabama.

Pennsylvania); the Military Association of Atheists and Freethinkers; Minnesota Atheists; Boulder Heretics (Colorado); the Secular Student Alliance; and the New Orleans Secular Humanist Alliance. All of these *amici* are nonprofit, humanist, atheist, or freethinker organizations with regional or national membership dedicated to strict separation of church and state. *Amicus* EvolveFISH is a commercial concern which creates and distributes symbols and materials in the U.S., with particular emphasis on regions where church/state violations have been most pronounced.

All *amici* have an interest in defending the principle often articulated by this Court that the state may not favor religion over irreligion. All oppose government action that confers privilege on religious citizens and which renders citizens who do not share dominant religious beliefs (or any religious beliefs) "outsiders." All subscribe to James Madison's warning that "it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens." *The Complete Madison* 299-301 (S. Padover, ed. 1953) (quoting from "Memorial and Remonstrance Against Religious Assessments, 1785"). *Amici* offer this brief because this case presents a danger of deviation from the cherished principle that atheists, dissenters from majoritarian compunctions to civic religion, freethinkers, humanists, and infidels are "constitutional people" entitled to First Amendment protections.

SUMMARY OF THE ARGUMENT

The Establishment Clause forbids government from telegraphing to nonreligious citizens that they are less than valued members of the political community. When the state chooses to place religious symbols on public property, particularly at the seat of government, its choices have the expected effect of symbolically uniting the governmental and religious messages.

The "reasonable observer" standard presently employed to test for government endorsement of religion fails to take account of the evocative power of symbols in government's hands and fails to appreciate how religious symbols can be used as cudgels against those who do not subscribe to "mainstream" American religions or to any religion at all. It rests on assumptions that undercut Establishment Clause values and on false analogies.

The Court should abandon the reasonable observer standard and adopt a strong presumption that displays on public property that symbolically unite government and religion are unconstitutional.

ARGUMENT

The Establishment Clause rests "on the belief that a union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). It also tends to inject divisiveness detrimental to the social good and antithetical to constitutional guarantees of freedom of conscience. As the Court has observed, "The centuries immediately before and

contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions . . ." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947). While religion may provide "spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985), *overruled in part on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

But it is not only sectarian bullying that the Establishment Clause proscribes. "[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

The Court's recognition that government should not use its bully pulpit for the benefit of an "elect" among the faithful is plain in the language of its *Lynch/Allegheny* regime, which commands the state not to "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 495-96 (1989) (quoting *Lynch*, 465 U.S. at 687) (O'Connor, J.,

concurring).

The state's appropriation and emplacement of religious symbols telegraphs the theocratic chauvinism that this Court has proscribed. In cases too numerous to cite, this Court has proclaimed that government may not favor religion over irreligion – and yet government Decalogues proliferate.

Amici suggest that Decalogues proliferate because the "ins" and "outs" dichotomy of *Lynch/Allegheny* is undercut by the "reasonable observer" standard articulated in those very cases – a standard that is insufficiently respectful of nonadherents and which lends itself to levels of abstraction and rationalization that militate against effective Establishment Clause enforcement.[3] The "reasonable person" standard ignores what we know of the visceral way in which the populace responds to symbols

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[3] *Amici* realize that the specific question on which the Court granted *certiorari* here is whether "a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment." This brief is devoted to demonstrating how symbolic unity of church and state occur. In the context of this explanation, *amici* suggest changes in the legal standard and explain why. *Amici* are aware that in the simultaneously pending case of *McCreary County v. ACLU of Kentucky*, 354 F.3d 438 (6th Cir. 2004), *cert. granted*, No. 03-1693, 2004 U.S. LEXIS 6693 (Oct. 12, 2004), two of the questions before the Court relate to legal tests. *Amici* have the parties' permission to file a brief in *McCreary*, but believe that addressing the legal standard is central to resolution of both cases, and thus discuss it here.

served to it by government, and is too amenable to legitimating endorsements because it provides little more than a silhouette to lower courts (merely instructing them that an endorsement problem is "a legal question to be answered on the basis of judicial interpretation of social facts"). *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring).[4] It gives license to disregard the obvious import of the symbol itself as well as the dispositive fact that government has incorporated it as government's own speech, on government property[5] and instead to fixate on the degree of congruence with a faulty analogy to a museum and other distractions.

A different standard, which Justice Stevens has suggested, would be more respectful of nonadherents and

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[4] Lower courts as well as some Justices, scholars and irreligious citizens may believe that *Lynch* and *Allegheny* broadly legitimate state displays of religious symbols. In each, the Court examined a Christian creche. In each, it applied largely the same test. And yet it struck one display while sustaining the other. *Allegheny* itself, in examining a menorah and Christmas tree in addition to the creche, seemed to some members of the Court internally inconsistent. The fact that the creche was struck in *Allegheny* while the Christmas tree and menorah escaped scrutiny, and the Christmas tree was even held to "secularize" the menorah, mystified three dissenting Justices. *See* 492 U.S. at 638-46 (Brennan, J., dissenting) (joined by Marshall and Stevens, JJ.). Justice Stevens believed that the juxtaposition of the menorah and Christmas tree, far from secularizing either symbol, reinforced the religious character of both. *Id.* at 654-55 (Stevens, J., dissenting).

[5] Indeed, one wonders if "endorsement" is actually descriptive of a scene in which government has incorporated a religious symbol into a permanent display on its property.

in harmony with the proposition that the Establishment Clause protects atheists no less than Baptists who disapprove of prayer over school intercoms. A different standard would indicate a practical appreciation of the way in which governments deploy symbols and citizens synthesize them. For ultimately, the process of sending and receiving the message is the issue. Just as an appropriate constitutional test demands that we distinguish between real threat and mere shadow, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring), it must also strictly police against displays that forge a symbolic unity between religion and government.

I. THE COURT'S "REASONABLE OBSERVER" IS LEARNED IN THE LAW BUT NOT A STUDENT OF REALISM, AND HE SHOULD BE RETIRED.

Pavlov, it seems, never met Pinette. Scholars of politics, no less than of the arts, have taken note that all the world's a stage. As the pioneering political scientist Murray Edelman has explained, the evocative power of symbols in public settings results *precisely from the fact that government has ordained the content and provided the stage*:

> The courtroom, the police station, the legislative chamber, the party convention hall, the presidential and even the mayoral office, ... all have their distinctive and dramaturgical features, planned by the arrangers and actors in the event and

> expected by their audiences ...
> ...
>
> The common element in the political settings mentioned here and in others that could have been mentioned is their contrived character. They are unabashedly built up to emphasize a departure from [peoples'] daily routine, a special or heroic quality in the proceedings they are to frame. Massiveness, ornateness and formality are the most common notes struck in the design of these scenes, and they are presented upon a scale which focuses constant attention upon the difference between everyday life and the special occasions when one appears in court, in Congress, or at an event of historic significance.
>
> We know something of the impact of the manifestly contrived setting .... Such backgrounds make for heightened sensitivity and easier conviction in onlookers, and the framed actions are taken on their own terms. ... The creation of an artificial space or semblance thus sets the stage for a concentration of suggestions: of connotations, of emotions, and of authority. ... Through the creation of an artificial space a particular set of impressions and responses can be intensified, serving to

condense and organize a wide range of connotations, free of the irrelevancies, distractions, and qualifications of which everyday life mainly consists.

... The conspicuousness with which a setting is presented for observation and special attention in any social situation defines the degree to which an audience is being injected into an artificial universe or semblance. The latter in turn makes easier the functioning of evocative . . . symbolism . . . and involves a corresponding diversion of attention from cognitive and rational analysis and manipulation of the environment ... [C]ognitive manipulation of the environment or of referential symbols [will] produce a desired result ... [such as putting the focus] upon abstractions that powerfully grip emotions. [This is] not because there is a demonstrable tie to desired results, as in logical or mathematical manipulation, but precisely because there is no tie to consequences at all, no means of verification. People are therefore free to assure each other that the symbol means what they all passionately want it to mean: rain, fertility, a good crop, or another shared need. ... Social suggestion, not individual work and verification, becomes the stimulus of activity, and what is suggested is implicit in the setting.

Murray Edelman, *The Symbolic Uses of Politics* 95-98 (8th ed. 1977).

Manipulation of symbols within governmental settings is designed to: (1) impress a large audience (as opposed to one-on-one persuasive discourse); (2) legitimize future acts or policies of government, maximizing the chances that citizens will acquiesce in the rules they embody; and (3) establish or reinforce the citizen's definition of himself through identification with the polity or public officials. *Id.* at 98. Symbols of majoritarian preference thus become self-reifying. While government is always making a calculation in choosing and staging symbols, the citizen's response is more primitive than cerebral, hinting that Justice Kennedy, as he facetiously wondered if an Establishment Clause standard could be derived from "intuition and a tape measure," was onto something. *See Allegheny County*, 492 U.S. at 675 (Kennedy, J., dissenting).

We do not hold court in meat-packing plants or water parks, but rather in settings that amplify the seriousness of the proceedings that occur there. "The judicial bench and chambers, formal, ornate, permanent and solid . . . 'prove' the deliberateness, scholarliness, and judiciousness of the acts that take place in them, even [if] careful study of some of these acts in a university or newspaper office (different settings) may indicate they were highly arbitrary, prejudiced, or casual." Edelman, *supra*, at 99.

In sum, settings for governmental action and symbols used by government are not neutrally chosen and are not meant to be innocuous. Careful staging of symbols

offers or reinforces government's motivation. *Id.* at 101-02. Symbols are, moreover, durable, replicating on repeated exposure the same emotions they evoked on a first viewing, so that the setting in which government places a symbol is part of its effort to influence citizens' value structures. *Id.* at 106.[6]

If this theory of why government chooses to control not merely the message, but every nuance of the medium as well, is sound, this Court's "reasonable person" standard

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[6] Many years before the Court had developed formal tests for Establishment Clause analysis, it understood that symbols are irresistible preceptorial tools for government, writing:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a shortcut from mind to mind. . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance and respect: a bowed or barred head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943). In the context of Decalogue displays, for example, just as Alabama Chief Justice Roy Moore intended in installing a 5,280-pound granite monument in the hushed marble rotunda of the Alabama Judicial Building, cordoned off with red velvet, visitors were moved to bow their heads or bend their knees and pray. *See Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

underestimates the potency of symbols by overestimating the rationality of responses to them. Symbolic recognition and actuation does not operate on the cool plane of law where precedents, at least in theory, are dispassionately weighed against the particular reindeer, creche, and Christmas tree *du jour*. The Court's reasonable observer is an abstraction considerably removed from the masses who participate in cultural symbols offered to them rather than merely passively and neutrally filtering them. Such a standard is better understood as the judiciary mirroring itself through the glass of precedent than as a measure that accounts for an ordinary citizen's reality. At any rate, the standard the Court has chosen permits capitulation to the state's religious message far too easily. This is strangely incongruous, since the Court at the same time it purports to apply this standard recognizes that people react emotionally far more than cerebrally to symbols, that they react like "insiders" or "outsiders." The Court's insider/outsider dichotomy captures a central value of the Establishment Clause, even as the reasonable observer standard steers clear of the viscera.

II. THE REASONABLE OBSERVER STANDARD DEVALUES NONADHERENTS.

Ironically, the reasonable observer standard coexists in cases in which the Court's discussions reaffirm the commitment to avoiding preference for religion, even while the standard itself has pedigreed governmental favoritism for America's "mainstream" religions. *See* John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38

Harv. C.R.-C.L.L. Rev. 563 (2003). References to (one, singular) God abound in the Court's lexicon, thus implicitly privileging monotheistic Christians and Jews as a starting point. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Professor Tribe has wondered why the perspective to be applied in the *Lynch/Allegheny* regime is that of the reasonable "observer" rather than the reasonable "nonadherent." *See* Lawrence Tribe, *American Constitutional Law* 1293 (2d ed. 1988). In fact the concern for nonadherents expressed in *Lynch* and *Allegheny* is undone by the adoption of the reasonable observer as the benchmark of constitutionality. The nonadherent entitled to constitutional solicitude by the lights of these very cases is transformed by comparison to his "reasonable observer" counterpart into a person of trifling concern whose piddling grievances can be dismissed, and dismissed with an epithet, at that. A person who objects to Decalogues, Latin crosses, or other State religious promotions in core government buildings, parks, or public schools can be rejected as an "isolated nonadherent" who feels mere "discomfort [at] viewing symbols of a faith to which [he] does not subscribe," *Cap. Sq. Rev. Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); an "uninformed" "heckler," *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2004), *cert. granted*, No. 03-1500, 2004 U.S. LEXIS 6691 (Oct. 12. 2004); "fastidious," *Zorach v. Clauson*, 343 U.S. at 313; or "fevered." *See Newdow v. United States Cong. (Newdow I)*, 292 F.3d 597, 614 (2002) (Fernandez, J., concurring in part and dissenting in part) (individual opinion later withdrawn). Indeed, one wonders

if some of these cases contemplate that a nonadherent could be reasonable.

Rejection of the "reasonable nonadherent" standard posed by Professor Tribe has resulted in an endorsement analysis that, if not uniformly prone to assailing atheists for their febrile brains, is far too susceptible to majoritarian taint. *See* Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 Mercer L. Rev. 1669, 1712 (2003). Thus it is perfectly natural that Justice Brennan, even in dissent in *Lynch*, took it as a given that courts will have to struggle to disentangle themselves from ingrained majoritarian habits of response in order to declaim of municipal creches: "[T]his case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable." *Lynch*, 465 U.S. at 696 (Brennan, J., dissenting).[7] Ironically, one of the reasons the *Lynch* majority gave for rejecting a standard that would produce a brighter line is a factor that grows more salient daily and which should have cut the other way – the diversity and pluralism of American society. *Id.* at 678.

Perhaps it is not entirely unsurprising that the reasonable observer standard would legitimate the display

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[7] The words recall those of Justice Jackson, who anticipated the public opprobrium the Court would face in curtailing the majority's preference for a compulsory flag salute: "This case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." *Barnette*, 319 U.S. at 641.

of a creche (*Lynch*), of a menorah adjacent to a Christmas tree so huge it dwarfed the menorah (*Allegheny*), and of a Christmas tree itself (*Allegheny*). The Court undertook, it said, to determine whether a reasonable observer would find endorsement – not of a particular sect, but of *religion* – but the question it actually posed to itself in *Lynch* was whether displaying the creche would be perceived by its reasonable observer as conferring a *benefit* on religion. *Id.* at 683. Conferring a benefit is not, of course, the same thing as giving an endorsement or intermingling the messages of the government and the religious symbol.[8] The Court concluded, having framed the question in these terms, that no more "benefit" was conferred by placing a creche in a city park than by allowing religiously themed paintings to hang in state galleries. *Id.*

But framing the analysis in such terms not only misses the point, but also trivializes the extent to which adherence to a religious creed has been made relevant to standing in the political community. The appropriate question in a display case involves not "benefit" but rather, the existence of the sort of symbolic unity between church and state that the Establishment Clause proscribes.

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[8] The Court has very clearly distinguished between conferring benefits such as aid to parochial schools and taking action that symbolically links government and religion. That is the whole point of post-*Lynch* cases such as *Agostini*, 521 U.S. at 227-32, partially overruling *Grand Rapids v. Ball*, 473 U.S. 373, because *Grand Rapids* had presumed that a financial benefit was coterminous with symbolic union, and *Mitchell v. Helms*, 530 U.S. 793 (2000). In fact, the "benefit" question is perfectly appropriate for school-aid cases but quite jarring for any other species of Establishment Clause case.

Another way of saying this is in *Lynch/Allegheny* terms; namely, the government cannot welcome only the religiously inclined as citizen/insiders.

As Justice Brennan observed in his *Lynch* dissent:

> The primary effect of including a nativity scene in the city's display is … to place the government's imprimatur … on the particular religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive … .unique and exclusive … public recognition and approval of their views. … The effect on minority religious groups, as well as those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It [is] precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit.

465 U.S. at 701. Justice Brennan concluded that "[t]o be … excluded on religious grounds by one's elected government is an insult and an injury." *Id.* at 709. An insult and injury to nonadherents would persist even if a court were to determine that, as in *Lynch*, no "benefit" of cognizable proportions was conferred on religion.

III. THE REASONABLE OBSERVER STANDARD IS INSUFFICIENTLY SENSITIVE TO THE SYMBOLIC UNION OF CHURCH AND STATE WORKED BY PUBLIC DISPLAYS.[9]

Nor are the defects of the "reasonable observer" standard exhausted by discussion of its pejoration of

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[9] *Amici* by no means suggest that the separate *Lemon* test should be overruled or modified. *See Lemon v. Kurtzman*, 411 U.S. 192 (1973). Indeed, *amici* note that courts often gloss past the part of the "reasonable observer" standard that addresses "what viewers may fairly understand to be the *purpose* of the display." *See Allegheny*, 492 U.S. at 522 (O'Connor, J., concurring) (emphasis added). *Lemon* is a useful reminder that government's purpose matters, and is particularly instructive for the two display cases pending here: one in which government sought through retrospective subterfuge to sanitize a display already ruled unconstitutional (*McCreary*), and one in which a stone monument was erected as part of the Fraternal Order of Eagles' campaign to persuade governments to outfit public parks and buildings with Ten Commandments plaques and monuments, ostensibly to deter juvenile delinquency (instead of, for example, to distribute juvenile justice codes in schools or to start after-school programs) (*Van Orden*). *Lemon* probes governmental motivations without distraction, and neither *Lemon* nor ancillary cases dealing with sham purpose or government's usage of a religious symbol where a secular one would serve government's articulated purpose should be discarded. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (sham purpose); *Lynch*, 465 U.S. at 681 n.7 (Brennan, J., dissenting) (choice of religious means over secular alternative). Assuming that there could be a display case in which purpose were not an issue, however, the standard suggested in Part IV of this brief would be easier to apply than *Lemon*, which after all was not crafted in the display context but in a school-aid case.

nonadherents. While some courts do reach sound decisions even applying a standard that is both tacitly freighted to favor religion and amorphous,[10] the decisional process can be tortuous.

The two Decalogue cases pending here should be judged by the answer to the simple question of whether the display works a symbolic union of government and religion. This question does not require the cogitative peregrinations demanded by the reasonable person standard. The displays in each case are plainly unconstitutional if the factor for which we are testing is symbolic union that reinforces the faithful and alienates everyone else. Cramped spelunking into ill-fitting museum analogies and projection of majoritarian religious bias onto the reasonable observer who functions as a judge-penitent are distractions from this central question.

The dissimilarity in the physical arrangement of the religious symbols in *Van Orden* and *McCreary* and the differing results reached by the courts below highlight the circuity of the reasonable observer route. The *Van Orden* display is widely disaggregated, while the *McCreary* display is a congeries. The Fifth and Sixth Circuits, like their sister circuits in other Decalogue cases, parsed the minutiae of physical arrangements and tried to negotiate the conundrum.

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[10] *E.g., Indiana CLU v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001). Notably, in addition to its reasonable observer analysis, that court focused extensively on whether a planned 11,500-pound stone Decalogue would effect a "symbolic union of church and state" signaling approval to adherents and disapproval to nonadherents. *See* 259 F.3d at 771-72.

In the cases whose physical settings most closely resemble that of *Van Orden,*[11] the courts have devoted extended discussion to whether the setting is "museum-like," which quality legitimated *Lynch*'s creche. *See* 465 U.S. at 676-77 ("The National Gallery in Washington, maintained with Government support ... has long exhibited masterpieces with religious messages. ..."). The analogy was inapt in *Lynch* and remains so. Government museums provide a forum for a variety of artistic representations without endorsing any. A Dutch master's work might hang adjacent to a Russian icon or "The Last Supper" – or any of these works could hang on a museum wall as its sole adornment without sending a message of governmental approval.

The *McCreary* court noted the disparity in function between a museum and a courtroom and cogently explained another reason that the metaphor is anomalous.

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11 Not coincidentally, these cases involve displays in which the Fraternal Order of Eagles persuaded government to donate public space for the FOE's gifts of Decalogues. *See O'Bannon*, 259 F.3d 766 (Decalogue monument to be placed on grounds of complex of civic buildings spanning two acres and containing a dozen separately spaced monuments); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003) (monument was to be placed on Capitol grounds near other government buildings, near the road, and was particularly prominent due to proximity of "floral clock"); *ACLU v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated by and reh'g en banc granted by*, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004) (Decalogue in large city park, not near government buildings, and monument stood alone). The FOE's campaign on behalf of governmental Decalogue displays is detailed in the original *Plattsmouth* opinion.

Citizens come to courthouses to obtain enforcement of the laws; they are rarely there other than "by necessity – whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote or renewing their driver's licenses. County courthouses also exude a coercive pressure, ranging from compulsory jury service to bench warrants to judicial decrees." 354 F.3d at 461. Museums share none of these attributes.

The Seventh Circuit, considering the museum analogy where various statues and monuments occupy not city parks but core municipal buildings or grounds of government offices, noted that even if a multiplicity of statues rendered the grounds arguably "somewhat akin to a museum," any conclusion that this neutralized the religious meaning of the Decalogue was wrong. It concluded, "This is not some museum nestled in some secluded park. The grounds, which house, among other things, the Capitol, the Governor's office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals, is the seat of Indiana government." *O'Bannon*, 259 F.3d at 772. Such "displays at the seat of government [merit] particularly careful scrutiny" because they "run[] a special risk of making religion relevant, in reality or public perception, to status in the political community." *Id.* (citing *Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring)). *Accord Adland*, 307 F.3d 471. *See also ACLU v. McCreary County*, 361 F.3d 928, 932 (order denying rehearing *en banc*) (6th Cir. 2004); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000);

American Jewish Cong. v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987).

In *Van Orden*, the monument is not only on the grounds of the seat of government, but it was approved by the Fifth Circuit because it is "at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building. It is plainly linked with those houses of the law ..." 351 F.3d at 181. This, of course, is a significant reason that the monument should not be sustained, as the Seventh Circuit would have held on *Van Orden*'s facts, to judge from its reasoning in *O'Bannon*.

Blatant symbolic conflation of divine law and man's law is prohibited. This conflation is also why the staging of the Bill of Rights, a few documents from historical figures or Congress referencing wholly religious matters, and the Ten Commandments in a putative "Foundations of Law" display in courthouses and schoolhouses was rightly prohibited by the panel below in *McCreary*.

Courts that instinctually reach toward the symbolic union question as the heart of the matter recognize that it is not metaphors but effects that count. When government deliberately places its own secular texts or symbols prominently with religious texts or symbols, it is not constructing an innocuous exhibit that neutralizes the message of the religious artifacts. Far from secularizing the religious symbols, it is identifying the most cherished emblems of its statehood with the religious message. *See McCreary*, 354 F.3d at 460; *O'Bannon,* 259 F.3d at 773 (where Bill of Rights and Indiana Constitution's Preamble referencing "Almighty God" are placed with sacred texts,

this "signals that the state approve[s] of such a link and [is] sending a message of endorsement"); *Books*, 235 F.3d at 307 (FOE Decalogue topped by American eagle gripping the national colors in its talons symbolically equates government and religion and is thus an endorsement); *ACLU v. Ashbrook*, 375 F.3d 484, 494 (6th Cir. 2004) ("[b]y placing the Decalogue in apparent equipoise with the Bill of Rights" the state creates the impression that it equates civil law with a divine code); *Adland*, 307 F.3d 471 (monument on Capitol grounds featuring American flag in the eagle's talons along with the Decalogue, Chi and Rho, and the all-seeing eye of Providence impermissibly links government and religion); *Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1987) (Latin cross surrounded by symbols of city on municipal seal forged symbolic link between Christianity and government). The cases just referenced reached the right results because they, unlike *Van Orden*, asked the right question.

IV. JUSTICE STEVENS HAS PROPOSED A BETTER APPROACH THAN THE REASONABLE OBSERVER STANDARD.

As explained above, the reasonable observer standard tempts courts to ask the wrong questions and ratifies implicit biases toward "mainstream" monotheistic religions. It is, moreover, so unstructured that it confuses those who must apply it. Of *Allegheny*'s counterintuitive conclusion that one religious symbol could secularize another in the reasonable observer's eyes, Justice Brennan remarked:

> I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. … But I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing, and accent expressed in [the majority's] opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

492 U.S. at 643 (Brennan, J., dissenting).

Justice Stevens has proposed a baseline rule that respects core Establishment Clause values and which would inject clarity. He would "create a strong presumption against the display of religious symbols on public property." *Allegheny*, 492 U.S. at 650 (Stevens, J., dissenting). This presumption would "prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular." *Id.* at 652.[12] In other words,

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[12] This formulation is perhaps more permissive than Justice Brennan's would have been. *See id.* at 637 (Brennan, J., dissenting) ("I continue to believe that the display of an object that 'retains a specifically Christian' [or other] religious meaning … is incompatible with the separation of church and state demanded by the Constitution") (internal citations omitted); *id.* at 643 (stating that the Court's recognition that "the menorah is a religious symbol" "should have been the end of the case"). While *amici* agree with Justice Brennan, they realize that the Court is unlikely to do so here.

Justice Stevens would ask whether the religious and civil messages are impermissibly linked. His presumption would screen for the symbolic union the Constitution forbids, leaving unmolested friezes that commemorate not great proselytizers but great lawgivers even if Moses is depicted among them, *id.* at 652-53, while it would proscribe "a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall." *Id.* at 652. His presumption would also proscribe a courtroom carving of Moses, Confucius and Mohammed because such a display would honor religion as surely as would the erection of a "Latin cross on the roof of city hall." *Id.*

Justice Stevens' suggestion should not be rejected out of hand as "hostile to religion," because as just demonstrated, it is hostile only to endorsements of religion, which should be unobjectionable. Justice Stevens' presumption would be raised only in the display arena; it would not bar the *study* of the Ten Commandments in public schools, but merely prevent their posting on a schoolhouse wall with no evident secular context. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (contemplating that Commandments may be integrated into a study of history, civilization, ethics, or comparative religion even though they may not be posted on schoolhouse walls). The Court is free to employ whatever hypothetical constructs it thinks useful to lower courts in assessing the application of the presumption in particular cases; the existence of the presumption as a starting point would no doubt render any factors the Court would choose more clear than the present "reasonable observer" standard.

Adoption of Justice Stevens' presumption would be fair to all citizens in refusing to permit the organs of government to be appropriated by aspiring theocrats. It would greatly aid in depoliticizing the Establishment Clause, which was designed to withdraw rights of conscience "from the vicissitudes of political controversy." *Barnette*, 319 U.S. at 638. It would mark an improvement in judicial understanding of what symbols mean, politically and religiously. This Court should, accordingly, revisit Justice Stevens' dissent in *Allegheny* and consider the evident as well as the latent flaws of the current standard discussed by *amici*.

CONCLUSION

The Constitution's solicitude for "constitutional people" who do not believe in deity is subverted by a reasonable observer standard which subtly incorporates or ratifies "mainstream" monotheistic assumptions. This renders these constitutional people, too often, constitutional strangers. The Court's current standard fails to appreciate how actual nonhypothetical citizens react when government communicates through symbols. Religious symbols in or near core government buildings are particularly evocative because they marry the visual majesty of government to those religious symbols. This Court should adopt a standard that is equal to the aspiration of treating religious adherents and nonadherents exactly the same.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

(8)

No. 03-1500

In The
Supreme Court of the United States

Thomas Van Orden,
Petitioner,

v.

Rick Perry, et al.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For Fifth Circuit

Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner

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QUESTION PRESENTED

Whether government display of a sacred text is subject to a presumption of unconstitutionality, rebuttable only by objective evidence, visible at the site of the display, that clearly negates the appearance that the government endorses what it displays.

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INTEREST OF THE AMICI

The amici joining in this brief are Christian or interfaith religious organizations. These amici are concerned about the religious liberty of all persons, *and* about government undermining true religious faith by using religion for political purposes. This case is one of many in which government displays a sacred text, and then distorts that text and diminishes its religious significance by claiming that the text is primarily secular in purpose and effect.

The Baptist Joint Committee is a religious liberty organization serving fourteen cooperating Baptist conventions and conferences in the United States. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

The Interfaith Alliance Foundation is a unit of the Interfaith Alliance, an interfaith group of 150,000 people of faith and goodwill, from seventy different faith groups, working to promote interfaith cooperation around shared religious values and to strengthen the public's commitment to the American values of civic participation, freedom of religion, diversity, and civility in public discourse. This brief is filed with consent of all parties.[1]

SUMMARY OF ARGUMENT

When government displays a sacred text, it must be presumed to endorse that text. This presumption should be rebuttable only by equally prominent evidence at the site of the display that objectively negates the appearance of

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[1] This brief was prepared entirely by counsel for amici. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. Petitioner's consent is on file with the Clerk; Respondent's consent is submitted with the brief.

endorsement. Such a presumption is implicit in this Court's earlier cases; it should be made explicit.

The lower courts' failure to insist on clear and objective evidence has led to much litigation over attenuated claims of secular purposes and secular effects for displays that are clearly religious. The result is a persistent pattern of high-profile litigation in which government desacralizes sacred texts, distorting and undermining the text's religious meaning in its effort to demonstrate secular meanings.

Many of the alleged secular purposes and effects in these cases are shams. In this case, the secular purposes and effects alleged in this case are clearly insufficient to negate the state's explicit endorsement of the religious text. The alleged secular purpose to honor the Fraternal Order of Eagles is not explicitly stated at the site of the display, is not known to the reasonable observer, and is entirely consistent with a purpose to also endorse the Commandments.

The alleged secular effect of demonstrating the Commandments' important role in the development of American law is not explicitly stated at the site of the display, is not known to the reasonable observer, and depends on a premise that is demonstrably false. The Commandments have not had a significant secular role in the development of American law. Most of the Commandments are not part of American law at all, and those that are part of American law were part of Anglo-Saxon law long before the Anglo-Saxons learned of the Commandments. As a statement of the numerically dominant religious traditions in the country, the Commandments lend moral and religious support to parallel legal provisions. But this is a religious function, not a legal one.

Most of the circumstances that might rebut the presumption of endorsement can be specified in advance. Some displays of sacred texts may be integral parts of a larger message that is neutral with respect to the religious content of the sacred text, as in objective educational materials and museum displays. Certain ceremonial uses of

very short sacred texts might fit within Justice O'Connor's test for identifying secular uses of religious language, set forth in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2323-27 (2004) (O'Connor, J., concurring). Some short quotations, taken from religious sources but lacking expressly religious content, may serve as eloquent statements of ideas that are secular as well as religious. Other unusual circumstances may arise, but there are few plausible secular reasons for displaying sacred texts.

ARGUMENT

I. This Court Can and Should Provide a More Objective Definition of "Endorsement" for Cases Where Government Displays a Sacred Text.

A. Government Display of a Sacred Text Endorses That Text, Unless the Government Visibly and Objectively Negates That Endorsement.

At issue in this case is a state's freestanding display of a sacred text at the seat of government. Such a display necessarily endorses the religious message of the text displayed -- unless the state takes clear affirmative steps to negate that endorsement or unless some other unusual circumstance, apparent to the reasonable observer of the display, negates any endorsement of the religious message.

It is of course rare for any person to erect a sign to display a message with which he disagrees. Rather, the most obvious and most common reason to display a text is to more widely disseminate the message expressed in that text, so that people who read the displayed text will believe what it says, or act on what it says, or at the very least, reflect on what it says. This is true of ordinary signs bearing secular texts, and it is equally true of formal monuments bearing sacred texts.

Even if a textual display is owned by a person with some unusual secret intention, a reasonable observer of the display has no way to know that. The observer can infer only that the display's owner intended readers to believe the stated message. As an ordinary matter of fact, display of a sacred text emphatically endorses the message in that text.

This commonplace factual inference should support a legal presumption: government display of a sacred text presumptively endorses the religious message in that text, and the burden is on government to clearly rebut the presumption of endorsement with objective evidence visible to the reasonable observer. In this and similar cases, the endorsement of the displayed text is open, obvious, and difficult to plausibly deny. The evidence that overcomes that impression of endorsement must therefore be equally open and obvious, and it must be strong enough to objectively outweigh the message of endorsement.

Structuring the endorsement test in this way is fully consistent with this Court's prior cases. This Court has never accepted a claim that government can sponsor a religious message composed of words without appearing to endorse that message.[2] The only arguable exception is *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding legislative prayers, but that case was decided on the basis of a unique tradition giving rise to a unique exception to the usual rules; the opinion did not even discuss the Court's usual tests for Establishment Clause cases.

In *Stone v. Graham*, 449 U.S. 39 (1980), the only prior case involving a passive textual display, the Court flatly rejected the state's claim of a secular purpose for displaying a sacred text. The Court viewed the sacred text as speaking for itself and declaring its own purpose and

[2] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Treen v. Karen B.*, 455 U.S. 913 (1982); *Stone v. Graham*, 449 U.S. 39 (1980); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

effect, *see id.* at 41, just as the prayers and Bible readings had spoken for themselves in the school prayer cases, *see id.* & n.3. And the Court noted that "this is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42. Such "integrat[ion]" into a larger secular message is the principal case in which a sacred text might plausibly be displayed for secular reasons. We urge the Court to make explicit what is implicit in *Stone* and other cases: when government displays a sacred text, it presumptively endorses that text, and government has the burden to rebut that presumption with objective evidence of an explicit secular message that clearly negates the appearance of endorsement.[3]

B. Unstructured Factual Inquiry into Government Purpose and Effect Invites Sham Litigation That Desacralizes Sacred Texts.

The courts below did not presume, either legally or factually, that government endorses what it displays.

[3] Displays consisting principally of symbols other than words may support a somewhat weaker presumption of endorsement. *Compare County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (invalidating creche displayed by itself, but upholding menorah displayed with Christmas tree and salute-to-liberty sign); *with Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding creche displayed with reindeer, wishing well, and the like). In the cases where religious symbols were upheld, religious symbols were mixed with symbols the Court viewed as secular. More fundamentally, the implicit statements of nonverbal symbols are more open to interpretation than express statements in words. A display of two tablets, symbolically representing the Commandments but not displaying their text, would thus present a much closer question than display of the sacred text. *See King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (upholding such a display in a county seal).

Consequently, they did not require government to take clear steps to objectively negate the appearance of endorsement.

The opinions below reveal an essentially unstructured factual inquiry into the purpose and effect of religious conduct by government. Unfortunately, this is a common approach to the endorsement test. The resulting litigation invites government to proffer implausible claims of secular purposes and secular effects for even the most obviously religious practices and displays. Sometimes these proffered purposes and effects are shams; sometimes they are hoped-for benefits of readers attending to the religious message. Federal judges are understandably reluctant to accuse state and local governments of bad faith, so even sham claims of secular purpose and effect are taken seriously, solemnly litigated, and solemnly adjudicated.

Most courts of appeals have properly invalidated freestanding displays of the Ten Commandments.[4] But each of these cases required an individualized and fact-intensive trial at which plaintiffs were required to refute implausible claims of secular purpose and effect. And occasionally, sympathetic judges actually accept government claims of secular purposes and effects for sacred texts. Judges sympathetic to government sponsorship of religion, not perceiving any objective rule from this Court, conclude that some religious displays are permitted, and so the implausible findings necessary to uphold such displays must be permitted as well. In this case, the courts below found a secular purpose and secular effect, with only the vaguest allusions to the intensely religious content of the display.

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[4] *See ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated & reh'g en banc granted*, No. 02-2444 (8th Cir., Apr. 6, 2004); *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003); *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

The content of the display in this case is indisputably, and profoundly, religious. The displayed text begins:

the Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me. Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.

The first two lines are centered and in larger type, approximately as shown here. One cannot learn any of these facts from the opinion below -- neither the words of the display nor the words and lines that get greater emphasis. Unable to explain how these facts fit with its conclusion that a reasonable observer would perceive the display as secular, the Court of Appeals ignored the display's actual content.

Structuring the litigation in this way demeans the religious teachings that governments set out to endorse. Time after time, in litigation that is nearly always highly publicized, government minimizes the religious significance of government-sponsored religious practices or displays. Government insists that sacred texts are really primarily secular in their meaning, or that they have been displayed primarily for secular purposes and have primarily secular effects. In this process, government lends its weight to distorted readings of sacred texts; indeed, government litigators deliberately desacralize these sacred texts. Secular readings of the text are promoted; the religious understanding of the faith groups to whom the text is sacred are deemphasized or ignored.

In the Ten Commandments cases, the Commandments with secular equivalents get emphasized -- and ripped from

context. The Court of Appeals repeatedly asserted that the Commandments are both religious and secular. *See Van Orden v. Perry*, 351 F.3d 173, 179, 180, 180 n.15, 182 (twice) (5th Cir. 2003). But this repeated claim is not true.

Some of the Commandments have secular equivalents:

> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> That shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbors.

In isolation, this "Second Table" might be understood as both religious and secular. But there is no secular equivalent to the "First Table," quoted on the preceding page. The introductory sentence is an unequivocal claim that these Commandments are the direct Word of God. The first two Commandments in this listing[5] are exclusively about the believer's relationship to God. This is equally true of the Third Commandment in this listing: there may be a secular norm of weekly rest and relaxation, or of giving workers a day off, but there can be no secular equivalent to an obligation to keep a day "holy." "Holy" is an inherently religious concept. And while there should be a secular norm of honoring one's parents, there can be no secular equivalent to the promise of divine reward attached to the performance of that Commandment. The First Table is **not** both religious and secular; it is exclusively religious.

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[5] As explained in Petitioner's Brief, there are multiple versions of the Commandments and multiple ways of numbering them. In many traditions, the Commandment against graven images is listed separately as the Second Commandment. We have listed and numbered the Commandments as they appear on the monument at issue in this case.

The two Tables of the Commandments are a unified whole, and Texas displays them as such. So even "Thou shalt not kill" is not a mere statement of secular ethics, or of Texas law; Christians and Jews believe it to be a direct command from God, personally delivered to Moses on Mt. Sinai. And of course the *religious* meaning of these Commandments only approximately corresponds to the *legal* meaning of modern prohibitions.

Lawyers and judges bent on upholding government displays of the Commandments necessarily ignore the Commandments with no secular equivalent, and necessarily ignore the origin and context of all the Commandments. Government efforts to endorse religious teachings, and the judiciary's deference to government rationalizations of those endorsements, do significant harm to what is constitutionally protected -- the private efforts of each faith tradition to teach its own sacred texts and its own understanding of those texts.

The unstructured way in which lower courts have applied the endorsement test also creates confusion among those charged with teaching about religion in the public schools. Some schools suppress objective teaching of social or historical facts about religion -- teaching that is both constitutionally permissible and pedagogically essential to any accurate understanding of American history. The press is currently covering a dispute in which a California history teacher claims that he has been forbidden to give the Declaration of Independence to his students, because the Declaration attributes our "unalienable rights" to our "Creator."[6] Numerous recent stories reported on schools that were allegedly teaching the story of the Pilgrims and the first Thanksgiving without mentioning who it was that the Pilgrims believed themselves to be thanking.[7] Subjective

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[6] *See* Dean E. Murphy, *God, American History and a Fifth-Grade Class*, N.Y. Times, Dec. 5, 2004.

[7] *See, e.g.*, Steve Chapman, *Schools, God and Thanksgiving*,

case-by-case judgments create uncertainty. Activists on both ends of the religious and political spectrum exploit that uncertainty to make sham or exaggerated claims, and cautious school officials conclude that the only safe course is to avoid the whole topic. The Court could reduce this uncertainty by adopting the proposed presumption and more clearly stating what is sufficient to rebut the presumption.

If the Court decides this case and its companion on the basis of a fact-intensive inquiry into the two individual displays, it will encourage further endless litigation about every such display in the country, and then about all the changes and additions that the sponsors of such displays might make to change the facts and require renewed litigation. We believe that this Court can give better guidance in these cases. The Court should announce a presumptive rule, and it should require readily visible and objective evidence to overcome that presumption. The Court can even identify in advance most of the legitimate uses of sacred texts that would rebut the presumption. The resulting rule would be much clearer and more workable.

II. The Courts Below Relied on Evidence That Is Plainly Insufficient to Negate Texas's Explicit Endorsement of the Ten Commandments.

The religious message of the Ten Commandments is explicit and obvious. The apparent purpose to endorse that message, and the actual effect of endorsing that message, are immediately visible to any reasonable observer. For this endorsement to be credibly negated, other content in the challenged display must transmit a different message so clearly and strongly that it negates the usual message of

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Chicago Tribune, Nov. 25, 2004, available at 2004 WL 100740817; Laurel Lundstrom, *Religion Kept Out of Thanksgiving Stories*, (Annapolis) Capital News Service, Nov. 22, 2004, available at http://www.hometownannapolis.com/vault/cgi-bin/protect/view/2004/11/22-39.htm.

endorsement. The presumption that the state endorses what it displays should be rebuttable only by objective evidence visible to the reasonable observer at the site of the display. It should not be rebuttable by the oral testimony of government officials claiming private intentions, or by historic claims buried in the archives. It should not be rebuttable by claims of subtle secular messages that can be ferreted out only with effort that exceeds what is required to see the explicit message on the face of the display. When courts entertain evidence of offsite explanations or subtly implied secular messages, they invite sham claims of secular purpose and effect.

There is nothing in this case to rebut the explicit endorsement that appears on the face of the monument. The display is given no meaningful context independent of the sacred text itself. In that sense, the religious display is gratuitous -- not explained by, or plausibly motivated by, anything apart from the religious teaching embodied in the displayed text. To a reasonable observer who comes upon this display -- no matter how sophisticated the observer -- the only perceptible effect of the display, and the only imaginable purpose for the display, is to endorse the religious teachings thus displayed. Such an endorsement is clearly unconstitutional under this Court's cases.

The rationalizations offered by Texas in this case, and accepted by the courts below, are not clear, visible, and objective. Rather, they are weak, hidden, and inconsistent. They are plainly insufficient to overcome the clear message of endorsement naturally created by the state's display.

A. The Alleged Secular Purpose.

The Court of Appeals found a secular purpose "to recognize and commend a private organization [the Fraternal Order of Eagles] for its efforts to reduce juvenile delinquency." 351 F.3d at 178. But the Court of Appeals did *not* find that the monument achieves this purpose. It did *not* find a secular *effect* of honoring the Eagles, for the

obvious reason that the monument says nothing about this purpose. The monument states that the Eagles "presented" the monument, but it does not mention their work on juvenile delinquency and it says nothing about the state's opinion of the Eagles. The purpose to honor the Eagles was recited in a 1961 legislative resolution, a resolution wholly invisible to reasonable observers and forgotten by everyone until discovered in the research for this case.

We of course do not suggest that as a general matter the state can act only for publicly stated purposes, even in the context of the Establishment Clause. Rather, we suggest that when the state acts in a way that is openly and explicitly religious, thus triggering a presumption of religious endorsement, and then claims to have had a secular purpose, the credibility of its claimed purpose may depend on having made that purpose publicly visible in a credible way.

Even if unknown purposes are entitled to some weight in cases of presumptive endorsement, the alleged purpose to honor the Eagles does not negate a purpose to endorse the displayed text. Plainly Texas could endorse both the Eagles and the Ten Commandments. If the Eagles had offered a monument displaying text with which the legislature disagreed, the legislature would not have accepted the monument -- no matter how much it wanted to honor the Eagles. The Capitol grounds in Texas are not a forum open to any private organization that wishes to erect a permanent monument. The legislature chooses what monuments to accept, and each of the seventeen monuments displays a message that the legislature endorsed, at least at the time of acceptance.[8] And like any other actor, the legislature intends the natural consequences of its acts. It had a purpose

[8] We will not speculate on whether today's legislature still endorses everything said on the various monuments to Confederate soldiers. But even if the state's political sentiments have changed over time with respect to those monuments, there is no evidence of any similar change in majority views with respect to the Ten Commandments.

to disseminate the Ten Commandments on the Capitol grounds, even if it also had a purpose to honor the Eagles.

Judged by the objective test of what the legislature purposely did, the purpose to endorse the Ten Commandments predominated. The legislature permanently and publicly displayed the text of the Ten Commandments; it honored the Eagles only in passing, taking no steps to give that purpose anything remotely approaching the permanent prominence it gave the sacred text.

The purpose requirement is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). The example cited to illustrate this point was *Stone v. Graham*, 449 U.S. 39 (1980), where the Court held that "no legislative recital of a supposed secular purpose can blind us to th[e] fact" that "[t]he Ten Commandments are undeniably a sacred text." *Id.* at 41. To display a sacred text is to endorse that text.

Another striking and erroneous feature of the opinion below is the extent to which it placed on plaintiff the burden of proving religious purpose by evidence *other than* the state's religious conduct in displaying the sacred text. The Court of Appeals repeatedly emphasized that "there is no evidence of any religious invocations" or of clergy in attendance at the dedication ceremony in 1961, 351 F.3d at 179, and that there was no evidence of religious purpose "in the events attending the monument's installation," *id.* The court also said that "there was no religious service attending the acceptance of the monument in Texas," *id.*, by which it could only mean that there was *no evidence* of a religious service. In fact, the record tells us almost nothing about the installation ceremony. Given the content of the monument and social customs in Texas, it is highly likely that there were prayers at the installation. But there is no way to know. The lack of evidence is not surprising after more than forty years, and we are not suggesting that evidence was deliberately suppressed. Rather, we highlight these

passages on lack of evidence for what they reveal about the court's reasoning: the court apparently assumed that display of a sacred text can not speak for itself, and that plaintiff cannot prevail unless he offers *additional* evidence of a religious purpose for displaying the religious message.

B. Alleged Purposes That Did Not Produce Secular Effects

The reasonable observer is well informed, but he is not presumed to know undisclosed intentions. This Court has said only that the reasonable observer "must be deemed aware of the history and context of the *community and forum* in which the religious display appears." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (emphasis added). This statement has been quoted or paraphrased, with modest variations to accommodate variations in facts, in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); and *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001). In these cases, the reasonable observer was presumed to know facts that were openly disclosed and visible to anyone familiar with the dispute: that the government property was open to a wide range of private speakers in *Pinette* and *Milford*; that Ohio awarded tuition vouchers to individual students whose families could choose from a wide range of schools in *Zelman*; and that the Pledge of Allegiance is a patriotic ceremony that has been used in the ways described by the concurring opinion in *Newdow*. But within the context set by "the community and forum," the display speaks for itself. This Court has never assumed that the reasonable observer knows every fact buried somewhere in the public record, however obscure, however undisclosed in practice, and however far removed from the government display or conduct at issue. The Court of Appeals was therefore correct in not finding a secular effect of honoring the Eagles.

The 1961 legislative resolution, reciting a secular *purpose* to honor the Eagles, is irrelevant to secular *effect*.

Nor did the Court of Appeals find a secular effect of fighting juvenile delinquency. The original idea for the Ten Commandments monuments donated by the Eagles was that young people exposed to the Commandments could use them as a code of conduct and thus stay out of trouble. *See Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000). But this hoped-for consequence will come about only if the young people *believe* and act on the message of the Commandments. Fighting juvenile delinquency is of course a secular purpose, but the proposed means -- encouraging juveniles to believe a religious teaching -- is a religious purpose that requires an endorsement of that religious teaching. If government could encourage religion whenever it hoped that more widespread religious faith would lead to secular benefits, it could justify any degree of establishment it chose to pursue.

The argument that encouraging belief in the Commandments might reduce juvenile delinquency is a special case of the last major argument for established churches: that promoting religious faith would tend to produce a more moral and law-abiding citizenry. The founders rejected that argument not on the ground that it was false, but on the ground that it was insufficient to justify establishment. Opponents of establishment agreed that religion is conducive to morality, but they believed that government support for religion was both unnecessary and counterproductive to genuine religious faith.[9] We know, with far more than the usual degree of clarity in historical arguments, that the founders rejected the promotion of good behavior as a justification for establishment.

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[9] These arguments are well summarized in paragraphs 6-8 of James Madison's *Memorial and Remonstrance Against Religious Establishments*, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 67-68 (1947) (Appendix to opinion of Rutledge, J., dissenting).

C. The Alleged Secular Effect.

The Court of Appeals' discussion of secular effect is a pastiche of disparate and unrelated elements. The Ten Commandments monument is one of seventeen monuments on the Capitol grounds. 351 F.3d at 181. Each monument is freestanding, spread out over twenty-two acres of grounds, *id.* at 175, and the Ten Commandments monument is isolated from the others.[10] The monument is not in any visual relationship to any other monument such that the message of other monuments can affect, much less amend, the message of the Ten Commandments. Nor is there any subject matter relationship between the Ten Commandments and any of the other monuments. More than half the monuments honor military units or larger groups of veterans, and all but two honor classes of people -- soldiers, peace officers, volunteer firefighters, pioneer women, children.

The only monuments to ideas are the Ten Commandments and the Statue of Liberty. There are no monuments to any pair or group of contrasting or related ideas; no monument honors any belief about religion other than the Ten Commandments. There is no effort to explain any relationship between the Ten Commandments and the other monuments, and no such claim would be plausible. There is no monument to anything the legislature has not endorsed. The other sixteen monuments do nothing to modify the message of the Ten Commandments monument; they are essentially irrelevant.

In addition to the sixteen freestanding monuments, there are a variety of portraits, plaques, symbols, and historical displays inside the Capitol itself. One of these is

[10] For a map showing the approximate location of each monument, prepared by the state, see State Preservation Board, *Capitol Grounds and Monuments Guide* (2002), available at http://www.tspb/state.tx.us/SPB/Plan/FloorPlan/pdf/Grounds.pdf. This map also appears in the "Self-Guided Tour," which is in the record and is cited by the Court of Appeals. *See* 351 F.3d at 181 n.20.

a display of six national symbols on the floor of the rotunda, commemorating Six Flags Over Texas, the popular slogan for the history of six independent nations ruling Texas in turn: France, Spain, Mexico, the Republic of Texas, the United States, and the Confederate States (at least de facto). The Seal of Mexico, which is the Mexican component of this display, includes symbols from Aztec mythology. The Court of Appeals tries to portray the Seal of Mexico as an alternate religious display, an Aztec counterpoint to the Ten Commandments. *See* 351 F.3d at 176, 180.

Far from providing context to the Ten Commandments, this display illustrates what is required to actually negate the apparent endorsement inherent in a government display of religious content. It takes no long and attenuated explanation to point out the secular content of the Six Flags display.[11] The Seal of Mexico is naturally integrated, without the need for any conceptual gerrymander or strained explanations. The Six Flags theme is explicit, not implicit; the names of the six nations are spelled out in large letters in the display. A symbol of Mexico is *necessary* to the six-nations message of the overall display. The Seal is a legitimate symbol of Mexico, and in any event, the same symbols from Aztec mythology appear on the Mexican flag. The religious content in the Mexican seal is naturally absorbed into the explicit secular message of the Six Flags display.

The Six Flags display explicitly endorses the truth of the historic claim that six nations have ruled Texas, and implicitly endorses the claim that this history is a unique and romantic fact about Texas, deserving of commemoration at the heart of the Capitol. But it does not endorse every matter incidentally necessary to presentation of the Six Flags

[11] A photograph of this display is available at State Preservation Board, *Online Gallery: Significant Spaces*, available at http://www.tspb.state.tx.us/SPB/gallery/SigSpace/rot.htm. The Seal of Mexico is at the upper left, nearly upside down from the perspective of the camera.

message. The display implies no necessary view about any of the six nations or their chosen symbols. Even if the religious content of the Mexican seal were more easily recognized as religious, and even if it were a symbol of a living faith and not an historic reference to a religion long abandoned, its necessary use to create a Six Flags display would imply nothing about the state's views of the religion.

The Court of Appeals also notes that the state agency responsible for the Capitol grounds employs museum curators to care for the Capitol's historic artifacts and its art collection. 351 F.3d at 180-81. But these curators did not design the Ten Commandments monument, did not determine its content, and in fact have little to do with it. Apparently the only decisions the curators have ever made concerning the monument were to reinstall it and turn it around after construction of the Capitol Extension in 1993. *Id.* at 181. A professional curator who designs a display with an explicit secular message can lend credibility to the claim that religious material was reasonably necessary to the secular message. But here, the curators had no influence on the message of the Ten Commandments monument.

After these various diversions, the Court of Appeals at last concludes that the secular effect of the Ten Commandments monument is based on the role of the Ten Commandments in the development of the "laws of this country." *Id.* The legal significance of the Commandments is supposed to be indicated by the monument's location "on the direct line between" the Capitol and the Supreme Court building. *Id.*

There are multiple problems with this alleged secular effect. But the most fundamental one is that even if this message about legal development were discernable, it would at most be a subtly implied and undeveloped message. It would be overwhelmed by the clear and explicit message of the displayed text of the Ten Commandments. Such a subtle and implicit message cannot negate clear and explicit endorsement. When courts entertain claims that such subtle

and implicit alternate messages negate an explicit and obvious religious message, they invite sham defenses and make every case litigable.

Nothing in the monument's text alludes to either the alleged legal significance of the Commandments or to the alleged significance of their location. The monument is prominently located, very close to the Capitol, and within the broad, irregularly shaped space that can be described as between the Capitol and the Supreme Court. But there is no visible geometric relationship with architectural or symbolic significance. The "direct line" between the Capitol and the Supreme Court exists only in imagination. On the ground, such a line would run diagonally, cutting through hedges and intersecting all the actual streets and sidewalks at odd angles.

Even if there were an explicit statement that the Ten Commandments were significant in the development of American law, that conclusory, overbroad, and contentious statement would not negate the endorsement of the Commandments themselves, as this Court correctly held in *Stone v. Graham*, 449 U.S. 39 (1980). There are multiple reasons for the Court's conclusory assessment of the matter in *Stone*: space, prominence, context, and inaccuracy all contribute to the clear impression that the display in *Stone* was a display of the Commandments, with a comment about the development of law; it was not a display about the development of law, with the Commandments as an illustration. This case is *a fortiori*; here we have a display of the Commandments without even a comment about the development of law.

The text of the Ten Commandments take up far more space than a conclusory statement about their role in legal development, and infinitely more space than an undisplayed statement about their role in legal development. In *Stone*, the Commandments were far more prominent than the explanation, which appeared at the bottom in small print. Here, the Commandments are the only message that appears. Nothing else around the Commandments suggests a display

on the development of American law, either in *Stone* or here. Finally, as elaborated in the next section, the claim that the display of the Commandments is about the development of American law is belied by its inaccuracy.

D. The Ten Commandments Did Not Play A Significant Secular Role in the Development of American Law.

To say that the Ten Commandments exercised "extraordinary influence" on American law, 351 F.3d at 181, is to wrap a kernel of truth in such a vast overstatement as to demonstrate that the statement is a pretext to justify displaying the Commandments. What is plausibly true is that three of the Ten Commandments are an early example of prohibitions on homicide, theft, and false witness (now embodied in the law of perjury and defamation), and that the Commandments have been more visible than other ancient sources because they are part of the sacred text of the dominant religious tradition in Western culture. It is hard to plausibly claim any more than that.

Widely accepted religious teaching provides moral support for corresponding legal prohibitions. But that is a religious effect of the Commandments, akin to the argument that a religious people will be better and more law-abiding citizens. It is not an argument that any existing legal rules are derived from the Commandments.

The provisions of American law do not trace in any significant way to the Ten Commandments. Penalties for murder, theft, perjury, and defamation tend to appear early in the development of all legal systems, including those of ancient civilizations with no reliance on the Jewish scriptures.[12] The American states inherited prohibitions on

[12] *See generally* Russ VerSteeg, *Law in the Ancient World* (Carolina Academic Press 2002). *See id.* at 60-65, 68, 77 (describing homicide, theft, false witness, perjury, and defamation in ancient Mesopotamia); *id.* at 134-35, 165-69, 172-73 (describing perjury, homicide, theft, and

murder, theft, perjury, and defamation from English law. Such rules appear in the earliest surviving sources of English law, the "dooms" of seventh-century Anglo-Saxon kings.[13] These dooms compiled pre-existing customs; the substance of these laws had existed among the Germanic tribes before they were written down and before the Anglo-Saxons were Christianized.[14] The American law of murder, theft, perjury, and defamation thus traces back through centuries of English law to the barbarian laws of non-Christian Germanic tribes -- and this line of development is far more direct than any development from the Ten Commandments. The comprehensive standard sources -- Holdsworth,

defamation in ancient Egypt); *id.* at 216-17, 243-48, 254-55 (describing perjury, homicide, and theft offenses in ancient Athens); *id.* at 299, 334-37, 345-46, 347 (describing perjury, homicide, theft, and elements of defamation in pre-Christian Roman law).

[13] *See* Carl Stephenson & Frederick George Marcham, eds., *Sources of English Constitutional History* 1-10 (Harper & Rowe 1937) (reprinting excerpts from the dooms). There are many provisions penalizing homicide and theft; for perjury and defamation, *see id.* at 5 (Dooms of Hlothaere and Eadric ¶11). For analysis, see Frederick Pollock & Frederick William Maitland, 1 *The History of English Law Before the Time of Edward I* 52-53, 55-56 (2d ed., Cambridge Univ. Press, 1968) (Anglo-Saxon law of homicide and theft); 2 *id.* at 537 (Anglo-Saxon law of defamation); 1 *id.* at 39-40 (describing heavy reliance on oaths in Anglo-Saxon law); William Holdsworth, 2 *A History of English Law* 105 (4th ed., Methuen & Co., 1936) (Anglo-Saxon penalties for false accusations); Theodore F.T. Plucknett, *A Concise History of the Common Law* 483 (5th ed., Little Brown, 1956) (Anglo-Saxon law of slander).

[14] *See* Holdsworth at 19 (stating that Anglo-Saxon codes, which is what he calls the dooms, "enacted the customary law of the tribe"); 1 Pollock & Maitland at 44 ("in its general features, Anglo-Saxon law is not only archaic, but offers an especially pure type of Germanic archaism"). This Anglo-Saxon base persisted in English law after the Conquest. Pollock & Maitland conclude that "our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system." *Id.* at c.

Plucknett, and Pollock & Maitland -- have no index entries for the Ten Commandments, and in extensive reading on early English law in those sources, counsel has encountered not a single mention of the Ten Commandments.

Of course the Christianization of England contributed ideas that influenced law. But these ideas were nothing so basic as the points of overlap between secular law and the Ten Commandments. Holdsworth emphasizes the church's contribution of more advanced legal ideas derived from secular Roman law, not from religious faith.[15] The idea of writing down tribal laws and customs was itself one of these Roman ideas; thus the dooms first appear after conversion to Christianity.[16] Plucknett attributes to the influence of Christianity and its Jewish inheritance the concept of individual responsibility, holding individuals rather than families responsible for wrongdoing.[17] But the basic ideas that it was wrong to kill, steal, or bear false witness were known to the Anglo-Saxons before the Ten Commandments.

The Commandment forbidding adultery corresponds to legal rules that survive in American law only vestigially. Adultery is a ground for divorce that is rarely used in the age of no-fault divorce, and in a few states, it is still a crime, frequently committed but rarely prosecuted. Many Americans, including these amici, believe adultery to be immoral and destructive. But few Americans want any serious effort to criminally prosecute adulterers. The Commandment against adultery has thus become a religious and moral obligation with little remaining relationship to law. And at any rate, adultery too was prohibited in many early legal systems unrelated to the Ten Commandments, including that of the Anglo-Saxons.[18]

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[15] *See* 2 Holdsworth at 21-25.

[16] *See* 1 Pollock & Maitland at 11-12.

[17] *See* Plucknett at 8-9.

[18] *See* 2 Pollock & Maitland at 392-93, 543-44 & n.1; 2 Holdsworth

The Commandments against coveting, and the Commandment to honor one's father and mother, are religious and moral obligations that have never been legal obligations in Anglo-American law. The remaining Commandments, and the promise of divine reward for honoring one's father and mother, could not constitutionally be part of American law. These are purely religious teachings, concerning each person's relationship to God.

In sum, only three of the Commandments are a significant part of American law, and those three provisions were part of the law of England before England learned of the Commandments. Why would the state pick out this single text, with at best a loose and ill-fitting relationship to the law, to illustrate the development of American law? Of course it would not. The state displayed this text for its religious significance, not for its legal significance.

The state clearly intended to endorse the Commandments, but its rationalizations have a mixed and somewhat contrary effect. By attributing to the Commandments a legal significance they do not have, the state inflates the importance of the Commandments to citizens who do not believe in either Christianity or Judaism. But by emphasizing this false source of significance, the state necessarily distorts and conceals the Commandments' true significance in the faiths to which they are sacred. The claim that the Commandments are a source of American law, like other attempts to secularize the Commandments, tends to minimize the religious and moral obligations set forth in the Commandments. Caught in an obvious attempt to promote a sacred text, and spinning secular rationalizations for its conduct, the state manages both to advance and inhibit religion at the same time -- to advance one understanding of the sacred text, and thereby to inhibit another, more religious understanding of that text.

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at 90.

III. The Court Can Specify the Kinds of Evidence Required to Rebut the Presumption that Government Endorses Any Text That It Displays.

A. A Sacred Text May Be Part of an Explicit Secular Message That Is Objectively Neutral with Respect to the Content of Sacred Text.

A sacred text may be an integral part of a secular message or display. We have already considered this possibility with respect to the Aztec symbols on the Seal of Mexico in the Six Flags display. In this section, we briefly consider that possible line of rebuttal more generally.

Consider how the Ten Commandments would be presented in a secular museum display designed by a professional curator, or in a curricular unit designed by a professional teacher -- assuming neither was committed to evading the state's obligations under the Establishment Clause, nor obliged to superiors demanding such evasion. In such a context, the Commandments would not be presented by themselves. They would be an integral part of some larger pattern, and the larger display or curricular unit would convey information in no way dependent on whether observers or students believed the Commandments. Such a display might survey ancient moral codes, or lawgivers through history. It might be a comparative survey of the world's great religions. It might be part of a history of the Jewish people. It might be many things, but it would not be a bare display of the sacred text. Other texts or objects would be included, and there would be explicit explanations of the relationship among the various items included. There would be a coherent pattern to the combination, not dependent on the religious significance of the sacred text.

Neither lawyers nor expert witnesses would be needed to explain the secular point of such a display, because the whole display would be designed to convey its secular point. The secular point would be open and obvious,

and the sacred text would be a natural component, necessary to the display.

Justice O'Connor said in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692 (concurring opinion). This is no doubt true, but why? It is true because the museum context makes clear that the painting is there because of its value as art, not because of its religious message. This is clear because there are many other paintings, because all of them have substantial value as art, and usually, because not all of them are religious. But even in a museum devoted to a period where substantially all art was religious, the reasonable observer could see that selections were based on artistic value.

Similarly in the case of a display or curricular unit conveying secular information, the reasonable observer can see that the sacred text was selected because it is necessary to the secular message, or at least that it was highly relevant and naturally illustrative or supportive of the secular message. But when the sacred text is displayed by itself, the reasonable observer can see only the sacred text and the state's desire to promulgate it.

This Court should adopt this model for justification of state display of a sacred text. Where the state claims that it is really using the sacred text to promulgate some secular message, that secular message must be explicit, it must dominate any religious implications of the display, and the sacred text must be an integral component, clearly necessary or at least highly relevant, to the explicit secular message of the display. The government must carry the burden of rebutting the presumption that it endorses what it displays.

It should be obvious that not every display that combines religious and secular elements will meet this standard. Such a display might simply endorse all its disparate elements, or it might be gerrymandered to include a marginally relevant sacred text, or its message might

depend upon a claim about the truth of the sacred text. The proposed presumption will not make every case easy. But it will make many cases easy, on both sides of the line. By holding governmental units to an objective standard, much sham litigation will be avoided, and this Court will no longer invite governmental units to desacralize sacred texts.

B. Government May Use Religious Language in *De Minimis* Ways for Secular Purposes.

In *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004), Justice O'Connor suggested a ceremonial deism exception, in which government uses very brief and generic religious statements for essentially secular purposes. We believe such uses of religious language might better have been described as religious but legally *de minimis*; these statements carry serious religious meaning for many Americans and are not mere religious forms with secular meanings. But however these ceremonial formulations are characterized, their use by government is very common. Justice O'Connor's contribution in *Newdow* was to propose a workable and reasonably objective test for distinguishing these ceremonial uses of religious propositions from more substantial uses that are clearly unconstitutional.

These amici assume that a government that displays a sacred text may rebut the presumption of endorsement by showing that the display satisfies Justice O'Connor's test in *Newdow*. But textual displays of the Ten Commandments plainly do not satisfy that proposed test.

Justice O'Connor's first factor is "History and Ubiquity." *Id.* at 2323. A finding of secular purpose requires "a shared understanding" of that purpose, and this "can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous." *Id.* There is no ubiquitous history of large monuments displaying the text of the Commandments. The Pledge of Allegiance is recited every day in every classroom

in nearly every school in America. Only a very small percentage of American towns have large government-sponsored monuments to the Ten Commandments, and even in those towns, most citizens encounter the monuments only occasionally. Petitioner's reliance on the state law library brought him regularly to the Capitol complex, but citizens of Austin without frequent business at the Capitol may encounter the Ten Commandments monument rarely or not at all. The "Ten Commandments" is well known as a phrase and a concept, but no version of the text is well known. The text is religiously important, but it is not routinely recited even within places of worship, and certainly not elsewhere. The reasonable observer is not familiar with the text, but more to the point here, the reasonable observer is not familiar with any ubiquitous secular use of the text.

Justice O'Connor's second factor is "Absence of worship or prayer." *Id.* at 2324. Passive display of the Commandments is not an act of worship or prayer and does not explicitly call for such an act from viewers. But for those who take the Commandments seriously, the Commandments inspire awe at the majesty of God and His Commandments. Reading the Commandments anew inspires an attitude of worship in many believers.

Justice O'Connor's third factor is "Absence of reference to particular religion." *Id.* at 2325. The Commandments do not satisfy this factor; they are from a specific religious tradition. "Thou shalt have no other gods before me" is unambiguously a claim of religious exclusivity. The God making this demand is not explicitly identified in Texas's display of the Commandments, but that missing fact is widely known among reasonable observers. Many observers who know little or nothing about the content of the Commandments will know, when presented with the Commandments, that they come from the Jewish or Christian scriptures. And the monument's reference to "the land which the Lord thy God giveth thee" is of course a reference to God's promise of the land of Israel to the Jewish people.

It is the Jewish and Christian God that claims priority over all other purported gods on Texas's Ten Commandments monument, and the state cannot endorse such a particularistic religious claim. Even among Christians and Jews, there are significant differences in presentation and interpretation of the Commandments, and as Petitioner points out, Texas has taken sides in those disputes.

Justice O'Connor's fourth factor is "Minimal religious content." *Id* at 2326. The two religious words in the Pledge were sufficiently minimal; the "repeated thanks to God and requests for blessings" in the prayers in *Lee v. Weisman*, 505 U.S. 577 (1992), were not. *Newdow*, 124 S. Ct. at 2326 (O'Connor, J., concurring). Brevity "tends to confirm" secular purpose, it limits government's ability "to express a preference for one religious sect over another," and in oral ceremonies, brevity makes it easier for dissenters to "opt out" at the religious passage. *Id.*

The Commandments have substantial religious content; Texas's version is 120 words, slightly longer than the benediction in *Weisman* (114 words). Even if the Second Table is excluded on the ground that those Commandments have secular equivalents -- and we have already stated our objection to treating any of the Commandments as merely secular -- the Texas monument devotes 66 words to the explicitly religious content of the First Table. Either way, this is substantial religious content, too long to serve any of the purposes attributed to religious brevity. Displaying the entire text of the Commandments confirms a religious purpose to endorse the Commandments, not a ceremonial secular purpose. There are ample words to "express a preference for one religious sect over another," and far too many words for anyone to comfortably opt out if the monument's text were to be read aloud. To say that the Commandments have "minimal religious content" is to attempt to desacralize the Commandments.

C. The State May Use Brief Quotations from Religious Sources with Meanings Equivalent to Secular Sentiments.

"That they may truly and impartially administer justice" is engraved over the original main entrance of The University of Texas Law School. The source is not attributed, and the phrase is an entirely appropriate sentiment for a secular law school. But the phrase is taken from the Book of Common Prayer and thus was originally part of the prescribed prayer for the King's ministers by members of an established church.

Despite its religious origin, the phrase has no explicitly religious content, and its meaning is entirely appropriate to its context. We think it is objectively apparent that the Law School's use of this phrase does not endorse its religious origins, or any religious meaning; rather, it borrows an eloquent formulation of an idea that could be either secular or religious.

A somewhat more troubling example of the same category appears high up on the Tower, the University's Main Hall: "Ye shall know the truth and the truth shall make you free." This is borrowed from the *Gospel of John*, 8:32, again without attribution. In this example, the meaning has been changed. In *John*, the sentence refers to the truth of Jesus Christ; at the University, it refers to the temporal truths to be discovered through research and study. In the University's use, it is an eloquent formulation of a secular idea central to the mission of the University. And it has no explicitly religious content; its literal meaning is fully consistent with an entirely secular reading and fully consistent with the University's usage.

This usage is slightly troubling because the University's usage tends to obscure the religious meaning of the sacred text. But precisely because the University so clearly changes the meaning, and so entirely removes the quotation from its religious context, the unattributed quotation has little tendency either to endorse the original

religious meaning or to distort the religious meaning of the same words when encountered in their religious context. The University takes no position, one way or the other, on the religious proposition in the original meaning.

Such secular quotations from religious sources have not been litigated. We briefly note them here simply to show that they are fully consistent with the proposed presumption. A government that displays a sacred text must be presumed to endorse that text. This presumption is rebuttable only by objective evidence, clearly visible at the site of the display, that negates any appearance of endorsing the religious sentiment and gives the entire display a secular meaning that dominates any religious meaning. Brief quotations with no explicitly religious content, used in contexts that are plainly appropriate to their secular interpretation, satisfy that standard.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to order that the monument be removed from state property and from state ownership.

Respectfully submitted,

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December 13, 2004

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN
Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Respondents pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of *all* religious traditions, and the equal participation of religious people in public life and public benefits. Over its first decade, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and others in cases involving the full range of religious freedom issues under federal and state constitutional and statutory law.

Amicus submits this brief to highlight: (1) that American governments routinely – indeed, inevitably – include religious elements as one component of their cultural expression more broadly; and (2) that such government expression that acknowledges the contributions of America's many religions to its culture is time-honored, ubiquitous, and reflects the full and ever-expanding range of American religious diversity. Aware of this broader history and context, courts should treat such expression with deference in order to respect the increasing religious diversity that they reflect.

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[1] All parties have consented to the filing of this brief. A consent letter from Petitioner is on file with the Court. A consent letter from Respondents is being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

One can scarcely imagine a government that does not engage in some form of cultural expression, or a culture that does not have religion as a meaningful component. But even if one did exist, it would bear no resemblance to our government and culture.

American governments at all levels—federal, state, and local—engage in many forms of cultural expression, such as commemorating historical events, celebrating national heroes, and affirming the distinct contribution of its many ethnic groups. And because religious diversity and ferment is one of the distinguishing characteristics of American culture, government cultural expression routinely includes religious elements.

The purpose of this brief is to illustrate by examples the longevity, ubiquity, and diversity of the American tradition of allowing—rather than selectively excising—religious elements as part of government cultural expression.

This widespread pattern of government behavior does not represent the "endorsement" of any one religion or religion generally. Instead, it is simply the ongoing *recognition* and *acknowledgement* of the important role of America's many religions in its public life—activities that this Court routinely permits under the Establishment Clause.

In order to respect the flourishing of religious diversity that this government expression reflects, courts should review it with deference. Specifically, the reasonable observer should be deemed familiar with the broader phenomenon that ordinary cultural expression by government will frequently contain religious elements in a religiously diverse society. Monuments like the one at issue here should be viewed as merely one religious patch in the broader—

secular and religious—cultural quilt of our society.

ARGUMENT

I. GOVERNMENT CULTURAL EXPRESSION IN THE UNITED STATES NECESSARILY AND LEGITIMATELY REFLECTS THE RELIGIOUS DYNAMISM OF AMERICAN CULTURAL LIFE.

The Constitution generally affords federal, state and local governments plenary control over their own speech, and makes them primarily accountable to the electorate—not the judiciary—for the positions they choose to express. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000); *Rust* v. *Sullivan*, 500 U.S. 173, 192-95 (1991).

Government speech often involves cultural expression, in the form of public monuments, memorials, festivals, and others. And in a society like ours, where religious freedom and diversity are such cherished values, the variety of religious views and the ensuing debate among them inform and energize the broader culture in meaningful ways. *See Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) (recognizing "the religious nature of our people," and that "the spiritual needs of man" give rise to a "wide . . . variety of beliefs and creeds"). *See also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (noting "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").[2]

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[2] Tocqueville similarly recognized the breadth and depth of the influence of religion in American public life:

> "I am sure that [Americans] think [religion] necessary to the maintenance of republican

Accordingly, government cultural expression will often reflect at least some religious aspects of the culture. Indeed, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984).

Rather than require that these religious elements be targeted for special exclusion from government expression, our Constitution requires only that they not privilege one religion over others, or privilege the religious over the secular. *See Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). *See also Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

Thus, the Constitution allows government to *recognize* and *acknowledge* the role of religions in cultural life, so long as government does not *endorse* any one or all religions.[3] *See Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"). *See also County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989) (permitting government recognition of religious holiday as "a cultural phenomenon").

In short, if government is to mark and make room for cultural expression generally—and one can scarcely conceive of a government that does not—some government expressions will necessarily include religious elements. Such expressions are especially common in a vibrantly, religiously diverse society like ours. Accordingly, they are routinely permitted, subject to certain narrow limitations on the otherwise broad power of government to control its own message.

> institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks."

Alexis de Tocqueville, *Democracy in America* 293 (J.P. Mayer ed. 1966). *See also School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberger J, concurring) ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion").

[3] The Establishment Clause does not generally forbid religious expression by government. *See, e.g., School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963) (noting that government schools may teach non-devotional courses on the Bible or religion, and that such courses are commendable). But the Establishment Clause does set certain *specific* parameters on such expression, in addition to the prohibition on endorsement discussed above, such as when it coerces compliance with religion, *see Lee* v. *Weisman*, 505 U.S. 577, 587 (1992), amounts to government proselytization, *see Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278 (2000), or otherwise excessively entangles government in religious affairs. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 613-14 (1971).

II. GOVERNMENT CULTURAL EXPRESSION IN THE UNITED STATES — HISTORICALLY, CURRENTLY, AND INCREASINGLY — REFLECTS THE FULL RANGE OF AMERICAN RELIGIOUS DIVERSITY.

Government cultural expression—in virtually every conceivable form—has included religious elements since the Founding. This phenomenon is not only long-standing and pervasive, but it has kept pace with the vast and ever-increasing diversity of religious faiths in America. What follows are some examples of government expression reflecting the breadth of that diversity.

A. Displays, Monuments, and Memorials

In 1966, Srila Prabhupada began reciting a Hare Krishna prayer under a tree in Tompkins Square Park in New York City, thus introducing his faith into American culture for the first time. On November 18, 2001, the City of New York's Department of Parks and Recreation dedicated a plaque to mark that tree as the "Hare Krishna Tree," and to commemorate the "founding of the Hare Krishna religion in the United States."[4]

The City of Mesa, Arizona dedicated a plaque to the memory of a Sikh murdered soon after September 11, 2001, simply because of his appearance and mistaken religious identity. Among other things, the memorial stated that, "Sikhs believe: In one God. That all religious paths lead to God. That all people are equal in the eyes of God. In peace,

[4] *See* Srila Prabhupada's Hare Krishna Tree, *available at* http://www.harekrsna.com/philosophy/acarya/newyork.htm (last visited Dec. 8, 2004).

and love for humankind."[5] The plaque was dedicated one year after the shooting at the "Embrace Diversity Memorial Event" sponsored by the City.

The federal government has made the Pueblo Bonito ruins in Chaco Canyon, New Mexico a national monument, in order to memorialize the main social and religious center of the Native American culture of the Anasazi.[6]

Similarly, in Hawaii, the federal government has extended special historic status two religious monuments, the Pu'ukohola Heiau Temple constructed in honor of the war god Kuka'ilimoku,[7] and the ancient Hawaiian cultural and religious site known as Kaloko-Honokohau.[8]

Sharon, Vermont is home to the Birthplace Memorial for Joseph Smith, Founder of the Church of Jesus Christ of Latter Day Saints.[9]

[5] *See* Balbir Singh Sodhi Memorial Dedication September 14, 2003 in Mesa, Arizona, USA, *available at* http://healingsource.com/sodhi/sept-14-2003/gallery/pages/med/100_med.html (last visited Dec. 8, 2004); Embrace Diversity Event to Offer Poignant Evening in Mesa, *available at* http://www.sikhnet.com/s/EmbraceDiversityNews (last visited on Dec. 8, 2004).

[6] Places of Peace and Power: The Sacred Site Pilgrimage of Martin Gray, *available at* http://www.sacredsites.com/americas/united_states/chaco_canyon.html (last visited Dec. 8, 2004).

[7] Puukohola Heiau National Historic Site, *available at* http://www.nps.gov/puhe (last visited Dec. 8, 2004).

[8] Kaloko-Honokohau National Historic Site, *available at* http://www.nps.gov/kaho (last visited Dec. 8, 2004).

[9] *See* Religion in Vermont, *available at*

Government museums such as the National Gallery in Washington, DC routinely display Islamic art,[10] as well as Buddhist and Hindu art.[11]

Government monuments and structures routinely depict Roman gods, such as the Roman Goddess of Liberty on the United States Capitol Building. Indeed, the Goddess of Liberty is one of the many monuments, along with the monument bearing the text of the Ten Commandments, on the Texas State Capitol grounds.[12]

Government buildings often reflect the religiosity of Americans, while respecting their religious diversity, by using generic references to God. For example, at the top of the Washington Monument in Washington, D.C. are the words, "Laus Deo" or "Praise Be To God." The Tomb of the Unknown Soldier in Arlington, Virginia contains the inscription, "Here Rests in Honored Glory an American Soldier Known but to God."[13]

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http://www.adherents.com/loc/loc_vermont.html (last modified Sept. 1, 2001).

[10] National Gallery of Art, Current Exhibitions: Palace and Mosque: Islamic Art from the Victoria and Albert Museum, July 18, 2004 - February 6, 2005, *available at* http://www.nga.gov/exhibitions/index.shtm#islamic (last visited Dec. 8, 2004).

National Gallery of Art, Past Exhibitions: The Sculpture of Indonesia1, July-4 November 1990, *available at* http://www.nga.gov/past/data/exh622.shtm (last visited Dec. 8, 2004).

[12] *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2004). Whether through oversight or inconsistency in his views, Petitioner has not challenged this religious symbol in this case.

[13] The Tomb of the Unknowns, Arlington National

B. Commemorative Events and Holidays

In recent years, the White House has acknowledged a wide range of faiths by hosting events to commemorate significant religious holidays. For example, the White House:

- Recognizes Hinduism by inviting religious leaders for a celebration of Diwali;[14]
- Recognizes Islam by hosting an Iftar dinner during Ramadan;[15]
- Recognizes Judaism by lighting and displaying a menorah throughout Hanukkah;[16]
- Recognizes Sikhism by celebrating the 400th anniversary of Guru Granth Sahib with Sikh religious leaders and practitioners.[17]

Similarly, state and local governments celebrate cultural and religious diversity by marking and

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Cemetery, *available at* http://www.arlingtoncemetery.net/tombofun.htm (last modified on Apr. 10, 2004).

[14] Express India, *Diwali celebrated in White House*, (posted online Nov. 11, 2004) *available at* http://www.expressindia.com/fullstory.php?newsid= 38356.

[15] The White House, Ramadan 2003, *available at* http://www.whitehouse.gov/infocus/ramadan (last visited on Dec. 8, 2004).

[16] Menorah Lighting from the White House, *available at* http://www.whitehouse.gov/president/holiday/ hanukkah (last visited on Dec. 8, 2004).

[17] The Sikh Network, *400th Anniversary Sikh Celebration at White House a Success* (last visited on Dec. 8, 2004) *available at* http://www.sikhnet.com/s/AdiGranth WhiteHouse.

accommodating holidays and hosting festivals.

New Mexico Governor Bill Richardson recently declared October 23, 2004 as Yogi Bhajan Memorial Day in honor of the Sikh leader.[18]

Pearland, Texas recognized July 27, 1982 as Meenakshi Temple Day to commemorate the opening of the Hindu temple after the final consecration rituals were performed.[19]

The Jersey City, New Jersey government celebrates the Hindu New Year annually with the Grand Phagwah parade, and celebrates Ramadan to acknowledge the cultural contributions of Muslim members of the community.[20]

C. Flags, Seals, and Mottos

The official flags and government seals of states commonly contain religious elements.

State Flags:[21]

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[18] Sarb Nam Kaur Khalsa, *SikhNet News*, "New Mexico Governor Richardson Declares 'Yogi Bhajan Memorial Day'" (October 23, 2004) *available at* http://www.sikhnet.com/s/YBMemorialDay.

[19] Hinduism Today, *Inaugural Ceremonies Held for Sri Meenakshi Temple in Houston, Texas* (last visited on Dec. 8, 2004) *available at* http://www.hinduismtoday.com/archives/1982/08/ 1982-08-06.shtml.

[20] Court Oversteps Its Bounds In Jersey City, *available at* http://www.schundler.org/schundler/court_oversteps_its_bounds_in.html (last visited on Dec. 8, 2004).

[21] State Flags of the 50 States, *availabe at* http://www.netstate.com/state_flags.htm. (last visited on Dec. 8, 2004).

- Florida: Features state motto "In God We Trust."
- Georgia: Features state motto "In God We Trust."
- New Jersey: Features Roman Goddesses of Liberty and Agriculture.
- New Mexico: Features sun symbol sacred to the Native American Zia people.
- New York: Features Roman Goddesses of Liberty and Justice.
- South Dakota: Features state motto "Under God the People Rule."
- Virginia: Features Roman Goddess of Virtue.

State Seals:[22]

- Arkansas: Features Roman Goddess of Liberty.
- Arizona: Features state motto "Ditat Deus" or "God Enriches."
- California: Features Roman Goddess of Wisdom.
- Colorado: Features "Eye of God" and state motto "Nil Sine Numine" or "Nothing without the Deity."
- Florida: Features state motto "In God We Trust."
- Hawaii: Features Roman Goddess of Liberty.
- New Jersey: Features Roman Goddesses of Liberty and Agriculture.
- New York: Features Roman Goddesses of Liberty and Justice.
- North Carolina: Features Roman Goddesses of Liberty and Plenty.
- South Dakota: Features state motto "Under God the People Rule."
- Virginia: Features Roman Goddess of Virtue.

Similarly, the flags, seals, and mottos of local

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[22] State Seals of the 50 States , *available at* http://www.netstate.com/state_seals.htm (last visited on Dec. 8, 2004).

governments often contain religious aspects. The City of Boston, for example, adopted the motto "Sicut Patribus Sit Deus Nobis" or "God Be with Us as He Was with Our Fathers" and prominently displays this message on the city's flag and seal.[23]

D. Coins, Medals, and Stamps

It is well known and often repeated that the national motto, "In God We Trust," appears on American currency. But other coinage issued by the United States Mint contains religious elements as well.

For example, the Mint has issued three commemorative medals in honor of Catholic clergy: Pope John Paul II for his "many enduring contributions to peace and religious understanding";[24] John Cardinal O'Connor for his advocacy of interfaith healing particularly among Catholics and Jews;[25] and Father Theodore M. Hesburgh for his "outstanding and enduring contributions to . . . the Catholic Church [and] the Nation . . . ."[26] These coins bear

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[23] A View On Cities, Boston Pictures, *available at* http://www.aviewoncities.com/img/zzflags/us_massachusetts_boston-l.gif (last visited on Dec. 6, 2004).

[24] The United States Mint, The Pope John Paul II Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID= 5 (last visited on Dec. 8, 2004).

[25] The United States Mint, The John Cardinal O'Connor Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID= 10 (last visited on Dec. 8, 2004).

[26] The United States Mint, The Father Theodore M. Hesburgh Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID=2 (last visited on Dec. 8, 2004).

witness to the dynamism of America's religious life and culture and how government expression appropriately responds to reflect that. Though Catholics were once a persecuted minority in this country, their contributions to American culture are now recognized and commemorated by the government.

Commemorative stamps routinely mark a wide variety of religious holidays and traditions. The United States Postal Service currently offers stamps for Kwanzaa, Hanukkah, Christmas, and Eid.[27] Commenting on the Eid stamp, the Postal Service's Vice President of Public Affairs and Communications explained that the purpose of the stamp was to "highlight the business, educational and social contributions of the estimated six to seven million Muslims in this country whose cultural heritage has become an integral part of the fabric of this nation."[28]

E. Declarations and Resolutions

Texas Muslims Legislative Day—an event in Austin, Texas hosted by state Representative Jerry Madden—is an effort by the Texas state government to actively include Muslims in the political process.[29]

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[27] Happy Holidays, usps.com/shops, *available at* http://shop.usps.com/cgi-bin/vsbv/postal_store_non_ssl/home.jsp (last visited on Dec. 8, 2004).

[28] Philatelic News, *Postage Stamp Celebrating Muslims Holiday to be Re-Issued* (Aug. 12, 2002), *available at* http://www.usps.com/news/2002/philatelic/sr02_052.htm (last visited on Dec. 8, 2004).

[29] Austin Area Interreligious Ministries, *For 9/11, Crossing the Divide* (Sept. 17, 2004), *available at* http://www.aaimaustin.org/news/9112004.htm (last visited on Dec. 8, 2004).

House Resolution 816, proposed in the 2nd Session of the 108th Congress on October 4, 2004, specifically acknowledges "the historical and cultural significance of Diwali"—celebrated by Hindus, Sikhs, and Jains in the United States—and calls on the President to officially recognize the holiday.[30]

Even before September 11, 2001, the United States Senate and House of Representatives proposed similar resolutions that recognized the Muslim community as "a vital part of our Nation, with more than 1,500 mosques, Islamic schools, and Islamic centers in neighborhoods across the United States."[31]

III. THE REASONABLE OBSERVER SHOULD BE DEEMED AWARE OF THE FOREGOING.

American governments inevitably engage in cultural expression; American culture inevitably includes diverse religious aspects; therefore, the cultural expression of American governments inevitably includes diverse religious aspects. And, as the numerous examples above illustrate, concrete experience confirms this abstract logic.

In short, any reasonable observer should be aware of the fact that government cultural expression in the United States commonly contains religious elements that acknowledge the contributions of America's diverse religious people to that culture.[32] And that fact should serve as the

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30 Recognizing the Holiday of Diwali, H. Res. 816, 108th Cong. (2004) *available at* //thomas.loc.gov; H. Cong Res. 174, 106th Cong. (1999) (enacted) *available at* http://thomas.loc.gov.

31 S. Res. 133, 108th Cong. (2003) (enacted) *available at* http://thomas.loc.gov.

32 *Cf. Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("B]ecause our concern is with *the political community writ large*, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [expression occurs]") (emphasis added).

context for evaluating whether any particular government expression that includes religious elements—such as the monument at issue in this case—passes muster under the Establishment Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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January 31, 2005

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE CHESTER COUNTY HISTORIC PRESERVATION NETWORK IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Establishment Clause of the First Amendment require that the Texas State Preservation Board remove a Monument containing the Ten Commandments from government property that has been designated as a National Historic Landmark?

Suggested Answer: No.

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I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS[1]

The Chester County Historic Preservation Network ("CCHPN") is a Pennsylvania non-profit corporation formed for the purpose of protecting and educating the public regarding historic and cultural resources within Chester County, Pennsylvania and its environs. Its stewardship tasks include the preservation of buildings, structures, sites, objects and landscape features for the benefit of present and future generations.

The CCHPN is interested in the outcome of this litigation as a result of its participation (also as an Amicus Curiae) in recent litigation seeking the removal of a "Ten Commandments" plaque affixed to the Chester County Courthouse in 1920.[2] The CCHPN believes that the argument advanced by the petitioner in this case – which is essentially the same as that advanced in the Chester County case – presents a radical challenge to the way decisions are now made regarding the historic preservation of buildings, monuments, and other objects. Because historical preservation is central to the CCHPN's mission and because the litigants in this case may not be motivated by the same interest in and concern about historic preservation, the CCHPN Board has authorized the filing of this Brief.

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[1] As reflected in letters filed with the Clerk, the parties have consented to the filing of this brief. The CCHPN and its counsel are the only authors of this brief; no other person or entity contributed to the preparation or submission of this brief in any way.

[2] *See Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003). Both the Chester County Courthouse and the Texas State Capitol grounds were listed on the National Register of Historic Places after the monuments at issue were built. The Texas State Capitol grounds has since achieved the higher historic "landmark" designation.

II. STATEMENT OF THE CASE

In 1961, the Fraternal Order of Eagles ("the FOE")[3] announced its intention to donate a monument "to the people and youth of Texas." The FOE's enthusiasm for monument building was not confined to Texas, however. Indeed, during the 1950s and early 1960s, it erected a series of similar monuments elsewhere in the United States as a part of its national campaign against what was then called "juvenile delinquency." The FOE program was originally inspired by E.J. Ruegemer, a judge in juvenile and probate court in St. Cloud, Minnesota. In a 1946 case, Judge Ruegemer was confronted with a 16 year-old who had stolen a car and struck and injured a passing priest. It turned out that the boy had grown up in a troubled home and had struggled with problems with his hearing and vision. So, instead of sending the boy to the Red Wing Reformatory, the judge sentenced the young man to learn and live by the Ten Commandments. He then got him a job. Warren Wolfe, *Monumental Showdown has St. Cloud roots; A Minnesota judge planted seeds for battles over the Commandments in 1946,* Minneapolis Star Tribune, August 30, 2003. According to a tribute to Judge Ruegemer, who went on to serve as a District Court judge, the youth was never in trouble again. *Commanding*

[3] The Fraternal Order of Eagles – founded in 1898 and originally comprised of actors and stage hands – is perhaps best known as the original proponent of Mother's Day. Yet its self-described history refers to many other accomplishments: "a Workman's Compensation Act, Mothers and Old Age pensions, Social Security laws and Jobs After 40. The modern day FOE is still fighting to liberalize present social benefits along with combating vicious diseases plaguing mankind through their sponsorship of the Art Ehrmann Cancer Fund, Max Bear Heart Fund, Jimmy Durante Children's Fund, "Doc" Dunlap Kidney Fund and the Diabetes Fund." http://www.foe.com/history/history.html. Theodore Roosevelt, Warren G. Harding, Franklin D. Roosevelt, Harry S. Truman, John F. Kennedy, Jimmy Carter and Ronald Reagan are listed as FOE members. *Id.*

Presence, Eagle Magazine 7 (March 2002) (published in honor of Judge Ruegemer's 100th birthday).

The FOE made the Ten Commandments part of its National Youth Guidance Program only after representatives of various Jewish, Catholic, and Protestant organizations had concurred on a rendition of the Commandments that could be considered "non-sectarian." *Books v. City of Elkhart,* 235 F.3d 292, 294 (7th Cir. 2000). Originally, the FOE had planned to distribute only paper copies of the Ten Commandments, but Cecil B. DeMille, sensing an opportunity to combine the project with promotion of his movie of the same name, suggested that something more permanent be used. Jess Bravin, *Commandments on Trial,* Chicago Sun-Times, April 24, 2001 at 6. Ultimately, Paramount Pictures provided the FOE with photographs of the prop used in DeMille's movie, and it was used as the model for the engravings on the monuments that were distributed throughout the United States. *Id.* Several of the monuments were dedicated by the stars of the movie, Charlton Heston, Yul Brenner, and Martha Scott. *Id.* When it was initiated, the FOE campaign received praise from then-President Harry S. Truman and then-FBI Director J. Edgar Hoover. Eagle, at 7.

This nationwide "juvenile delinquency" campaign came to Texas rather late in its lifespan, when the Texas Legislature, as a means of honoring the FOE's work in that field, approved the proposed donation by resolution in 1961. The monument was duly erected on government property approximately 75 feet from the state Capitol building. There is no evidence that the FOE's donation, the juvenile delinquency campaign, or the monument itself was the subject of any controversy in 1961.

There are several other monuments on the grounds of the Capitol. These include monuments commemorating the heroes of the Alamo, volunteer firemen, Confederate soldiers, Terry's Texas Rangers, Hood's Texas Brigade, the Texas cowboy, veterans of the Spanish-American war ("The

Hiker"), veterans of the 36th Infantry, disabled veterans, World War I, Pearl Harbor, Texas pioneer women, Texas children, Korean War veterans and Texas peace officers. There is also a Statue of Liberty replica (donated by the Boy Scouts of America). Each of these monuments has its own history. Each was promoted by some group interested in honoring someone or something. Each, at some point before its construction, received an approval from someone in authority in the State of Texas.

In 1970, the Capitol and its approximately 20 acres of surrounding land was listed on the National Register of Historic Places. *See* National Register Information System, found at http://www.nr.nps.gov/nrloc1.htm. In 1986, the same property was declared a National Historic Landmark. *See* State Preservation Board, found at http://www.tspb.state.tx.us/spb/capitol/texcap.htm. The parties have stipulated that the National Historic Landmark includes the "Capitol, together with its grounds and the monuments erected and maintained there." *Van Orden v. Perry*, 351 F.3d 173,175 n.1 (5th Cir. 2003). They have also stipulated that "the Ten Commandments monument is an element of a legally-protected National Historic Landmark." *Id.*

In 1983, the Texas Capitol caught fire, with near disastrous result. In response, Texas established a State Preservation Board and appointed a curator whose qualifications and duties are defined by statute. *See* Tex. Gov't Code § 443.006. The Capitol and its grounds are among the properties subject to preservation by the Preservation Board and its curator. The others include the Capitol Extension, the 1857 General Land Office Building and certain other designated buildings together with their contents and their grounds. http://www.tspb.state.tx.us. The Board also operates the Bob Bullock Texas State History Museum. *Id.*

For forty years, and despite the numerous visitors who tour the Capitol and its grounds each year, the FOE

monument was but one of the many artifacts that signified different contributions to the state's history and culture. In 2001, however, a Texas resident named Thomas Van Orden took offense at the depictions on the FOE monument and asked the State Preservation Board to remove it, because, he said, "Texas [had] 'accepted' the monument 'for the purpose of promoting the Commandments as a personal code of conduct for youths and because the Commandments are a sectarian religious code.'" 351 F.3d at 176. When the State Preservation Board denied his request to remove one of the monuments on the Capitol grounds,[4] Mr. Van Orden brought suit in the United States District Court for the Western District of Texas. When the District Court found against him, he appealed to the Fifth Circuit Court of Appeals, which affirmed the judgment of the District Court. He has now sought relief from this Court.

III. SUMMARY OF ARGUMENT

The CCHPN believes that this case is about historic preservation, not present-day evangelism. It recognizes that the litigants and their many Amici in this and other similar cases do not see it the same way, but the CCHPN suggests that they are carrying an ongoing argument that arose in an entirely different context into a field where it has no place and, worse, has the potential to do great harm.

The Defendants in this case are the members of the Texas State Preservation Board. The conduct at issue is the decision not to alter an existing historic landmark. Throughout this country, preservationists use public funds to maintain all kinds of buildings, monuments, and other objects, often on public property. Many of those were created by religious people and some were intended to

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[4] Texas law contemplates removal of a monument where it is deemed "unused surplus property that is not of significance," in which case it can be transferred, sold, or otherwise disposed of. Tex. Gov't Code § 443.006. Otherwise, a monument may be removed or relocated permanently only if it is "relocated to a prominent location." Tex. Gov't Code § 2166.5011.

convey a religious message. That is to be expected given the history of this country and its people.

Were this Court to accept the false assumption that lies at the heart of Petitioner's case – that "preservation" is a form of "endorsement" – it will ultimately need to choose between allowing preservation dollars to be spent "endorsing" religious messages or requiring preservationists to weed out history that is arguably religious and maintain only that which is safely secular. Present-day preservationists do neither. Nor do they wish to. For these reasons, the CCHPN asks the Court not to accept a false assumption that leads to a false choice.

IV. ARGUMENT

The question Mr. Van Orden has presented to the Court is artfully phrased. He asks the Court "[w]hether a large monument" on government property in Austin, Texas "is an impermissible establishment of religion in violation of the First Amendment." His focus, in other words, is on *the monument*, and whether *it* should be held to violate the First Amendment.

A monument, however, is an inanimate object. It cannot, by itself, violate the First Amendment because the First Amendment imposes no restriction on inanimate objects. To the contrary, the First Amendment imposes restrictions on certain government actions. In the present case, of course, the restriction at issue is the command that the government "make no law respecting an establishment of religion." U.S. Const. amend. I. To make out an "impermissible establishment of religion," in other words, Mr. Van Orden needs to identify a state actor who has "made a law" that violates the Establishment Clause. A monument – which cannot make a law – is in no position to do that on its own.

Once we turn our attention to specific state action, however, a problem arises. Indeed, it is this problem that

Mr. Van Orden and his Amici seek to avoid by talking about the monument rather than what the government did or did not do. By focusing on the monument, Petitioner attempts to conflate two different state actions taken at different times by different state actors. The first state action was the 1961 decision by the Texas legislature to accept the FOE's donation of the monument and the consequent construction of the monument on the Capitol grounds. The second state action, such as it was, was the 2001 decision by the Texas State Preservation Board to reject Mr. Van Orden's demand that it dismantle and remove the monument. By casting the issue solely in terms of the monument itself, Petitioner hopes the Court will accept his unspoken assumption that these two different decisions made at different times by different state actors are, for all practical purposes, a single decision or "law respecting an establishment of religion." It is a false assumption.

A. A Decision to Preserve a Monument is Not the Same as a Decision to Build a Monument.

The fundamental error in Petitioner's argument is his failure to distinguish between the preservation of an object and the original creation of that object. In the real world, a decision to preserve is different in kind than a decision to build.

To see the difference, let us consider how a southern city with a racially mixed population might react to a monument honoring Nathan Bedford Forrest. General Forrest was one of the most gifted and courageous of Confederate cavalrymen. He was adored by his men and, in the decades immediately after the Civil War, was regarded as a great hero in states where he had tenaciously resisted Sherman's advancing army. Before he became a general, however, Forrest was a slave-trader. Some historians also hold him responsible for the massacre of the predominantly black garrison at Fort Pillow after his Army recaptured that

fortress in April of 1864. And, after the war, he was one of the founders of the Klu Klux Klan.

How would a city council in a modern southern city react to a proposal to build a monument to General Forrest? It seems safe to assume that a project of that kind would attract some heated opposition. Surely, opponents would argue that General Forrest is *not* the kind of man their city should want to "honor" with a new monument. His values are *not* our values. We do *not* consider him to be a role model for our youth. To many citizens, a decision to erect the proposed monument would not only be inappropriate, it would be offensive. And it is hard to see how proponents of such a scheme could expect to carry it off.[5]

But now let us suppose, instead, that the Forrest monument is already there. Say it was erected a century ago by veterans of Forrest's Army and has been a significant landmark in town ever since. What does a modern city council do when approached by a committee of community activists who want the monument torn down? Well, that is a very different question than the hypothetical proposal to build a new memorial. By voting to leave the old monument alone, the typical city councilman does not see himself as "honoring" General Forrest or somehow endorsing General Forrest's racial views. To the contrary, he sees himself as preserving a city landmark of some historical interest and, perhaps, as remembering and respecting the perspective of the civil war veterans who built the monument – whether or not he himself shares that perspective. And perhaps he also worries that a vote to "dishonor" General Forrest will be perceived by some of his constituents as every bit as offensive as a vote to "honor" General Forrest would be

[5] Which doesn't mean they wouldn't try. In October of 2000, Forrest admirers dedicated a new memorial to him in Selma, Alabama. They were met with a political firestorm of opposition, and the mayor and city council of Selma ultimately voted to force the removal of the memorial to a different site. *See Nation in Brief,* The Atlanta Constitution, February 27, 2001, at 9A.

perceived by others. A vote to do nothing may well be the least offensive choice.[6]

It is entirely true, of course, that monuments honoring General Forrest have nothing to do with the Establishment Clause. The point, for the moment, is merely that the decision to build something is *not* the same as the decision to preserve it. They are different in kind. That having been said, however, there is no reason to think that the distinction between creating and preserving would cease to exist if we were to introduce "religion" into the hypothetical.

Suppose, for instance, that Petitioner were to file suit demanding that the words "In God We Trust" be removed from United States coinage? It is possible, perhaps, that he might find a judge willing to order the mint to delete that phrase from all our coins starting in 2005. But what are his chances of finding a judge willing to order the recall of all United States coins minted since the Civil War, when the motto was first added to the coins? Even if we concede that Petitioner finds the old coins to be just as offensive as brand new coins, and even though it is undeniable that the old coins will keep turning up in his change for the rest of his life, his "recall" case is simply different in kind than his "mint no more" case. After all, when the government mints a new coin saying "In God We Trust," it is at least *arguably* saying something about God. But when it declines to destroy old coins, it isn't saying anything at all. It is saving itself

[6] And so it has proved in Memphis, Tennessee, where there is a bronze statue of General Forrest on horseback on Union Avenue, not far from the General's grave. That monument was erected in 1901 by veterans of the Army of Tennessee. In the late 1980s and early 1990s, a group of community activists began a campaign to remove the monument on the ground that it honored a racist. The campaign continued for several years but was unable to garner any significant political support and the statue still stands where it always has in "Forrest Park." *See* Duane W. Gang, *Forrest Descendant Defends Legendary Civil War General,* Chattanooga Times Free Press, August 23, 2000, at A2; Michael Riley, *Nixing Dixie,* Time, August 2, 1993, at 30.

time and money. And it is avoiding chaos in the numismatic market.[7]

It is a version of this latter case, of course, that is presented here. The defendants in this case – all members of the Texas State Preservation Board – were never asked to erect a monument or marker containing the Ten Commandments. They are not in that business. The monument to which Petitioner takes offense is not of their making. They neither chose nor approved the inscription. They have never been asked to "endorse" it. What they were asked to do was to *remove* it. And *that* is what they declined to do. It follows that it is their decision *not* to remove the monument that is at issue in this case. That – not the original decision to put the monument where it is – is the government decision that Petitioner refused to accept when he brought this case. If the defendants here acted unconstitutionally, they did so merely by declining to accede to Petitioner's demand that they make a change in a National Historic Landmark.

B. A Decision Not to Disturb an Existing Object Does Not Constitute an "Endorsement" of the Original Message the Object's Creators Wished to Convey.

In fairness to Petitioner, he does not appear to disagree with the above. He sued the members of the State Preservation Board because he genuinely believes that their decision to preserve an object is for all practical purposes an adoption of the intentions of its creator. Petitioner believes, in other words, that "preservation" is

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[7] To complete the analogy, it might also come as no surprise if the Chester County Numismatic Society – for reasons having nothing to do with the religious views of its members – expressed alarm about the consequences of a hypothetical "recall" case while having no view at all about a hypothetical "mint no more" case. Coin collectors can and do value old coins without forming any moral judgment about what is on them.

essentially a form of "endorsement." Which may be why he and his Amici are so comfortable conflating the events of 1961 and the events of 2001.

But this perception is also an error. The recognition and presentation of the authenticity of historic items or places is not an endorsement of the messages they contain. Monument-*builders* generally do so out of a desire to convey a message of some kind. They may wish to "honor" a particular leader or "remember" fellow citizens who lost their lives in a given war or accident. Or they may wish to record their support of, or opposition to, some great "cause" of their time. In contrast, the motive behind a decision to preserve a monument is a recognition of the causes that provoked such passion at that earlier time or by those earlier persons. It is possible to decide to preserve a monument without either "approving" or "disapproving" whatever its creators had in mind when they created it.

In fact, the statutory framework governing the State Preservation Board demonstrates that the intention of the State of Texas *today* is to present to its residents and visitors an accurate depiction of its history, whether quirky or mainstream, politically correct or not. For instance, the monuments it preserves include a monument to Hood's Texas Brigade, even though very few Texans still support the cause for which General Hood's men fought so bravely. In other words, the values that animate the Preservation Board – to respect a judgment made by persons of another era that something was meaningful *to them* – is not the same as an independent evaluation and endorsement of that meaning today.

Sometimes, however, this distinction is lost – particularly when passions are running strong. Thus, the organizers of the campaign to tear down General Forrest's statue in Memphis perceived the decision to leave it standing as an "endorsement" of Forrest's racial views. To them, the "preservation" of the old monument seemed just as offensive as the creation of a new monument. And this is

precisely Petitioner's argument here. He perceives the current decision as an ongoing state endorsement of what the monument's creators had in mind when they created it. He cannot separate "preservation" from "creation."

Petitioner is not the only person to feel this way. Indeed, during the pendency of the court proceedings below, another group of community activists was trying to persuade their government to remove "longstanding" religious monuments in the Bamiyan Valley of Afghanistan. In that case, the people who had originally created the offensive works were unquestionably religious people. They had undertaken their work – the carving of two giant Buddhas into the side of a sandstone cliff – for religious reasons and no doubt hoped the statues would evoke the kind of reflection, contemplation, and spiritual growth that images of the Buddha are said to inspire among those who are open to such inspiration. All of that was a long time ago, however, and the people of the Bamiyan Valley haven't been Buddhist for a thousand years. Nevertheless, the Muslim people of the valley had preserved and maintained the great Buddhas that their ancestors had built for centuries – even though their own religion disapproved of the creation and veneration of images of any kind. It seems these otherwise devout Muslims recognized, as Petitioner and his Amici do not, that there is a difference between making religious images and merely preserving images made by one's predecessors.

Early in 2001, however, the "endorsement" argument that Petitioner and his Amici advance here suddenly emerged in the Bamiyan Valley. A small but vocal group of concerned "activists" not only took offense at the sight of the monuments; they wanted to protect others from the same offense. The reasonable observer cannot distinguish, they said, between "preserving" something and "creating" something; when you "preserve" the works of ancestors with whom you now disagree, you necessarily "endorse" those works. The only way to avoid "endorsement," the

argument went, is to remove the monument. Leaving it alone perpetuates – perhaps even "magnifies" – the original wrong.[8] And, sad to say, the black-robed rulers of Afghanistan ultimately bought this argument and ordered the destruction of the giant Buddhas.

Needless to say, this way of thinking is not new. To the contrary, rage against the monuments left b#y others runs through all of history and has infected all sorts of otherwise reasonable people and groups. It was a Christian mob – enraged at the efforts to preserve pagan art and sculpture at the Temple of Serapis (or "Seraphim") in Alexandria – that went on "an iconoclastic rampage" in 391 A.D. and burnt the Temple to the ground. Unfortunately, the Seraphim also served at the time as a kind of annex to the Great Library of Alexandria. But much of what that Library held was no doubt as "offensive" to the mob as the idols in the Temple – so it may be, from their point of view, that no harm was done.[9]

Similarly, it was a political and religious activist named "Blue Dick" Culmer whom Cromwell's government authorized to destroy the most beautiful stained glass windows in England on the ground that the "offensive" images depicted in the glass encouraged "superstition" and "Popery."[10] There was no Preservation Board in Cromwell's time, of course, and he probably would not have cared what it had to say even if there had been. Thankfully Cromwell's government didn't last long, but it was long enough for Culmer to get his job done. People like Culmer don't need

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[8] While there is no clear evidence the Taliban considered each day the Buddhas were allowed to stand a magnification of the initial decision, some courts here have. *See, e.g., Books*, 235 F.3d at 303.

[9] While some historians blame the Christians for the destruction of the entire library, see Michael Parenti, *History as Mystery* 96-97 (City Lights Books, San Francisco 1999), others blame Julius Caesar or conquering Muslims. For a balanced discussion of the question, *see* Alexander Stille, *The Future of the Past* 256-60 (Farrar, Straus & Giroux 2002).

[10] *See* Richard Marks, *Stained Glass in England During the Middle Ages* (Univ. of Toronto Press 1993).

much time to do their work – which is one of the reasons preservation so often loses out. The zealot needs only a moment to destroy the past.

Intolerant passion is not confined to religious zealots alone, however. In more recent times, avowedly atheistic governments have been exceptionally diligent in destroying buildings, monuments, and objects that reflect "offensive" social and religious values of earlier governments and times.[11] One might mention, in this regard, the Soviet program of systematic Church destruction in the 1930s, the Red Guards' campaign against "old" culture in China in the 1960s, and the destruction of much of Cambodia's heritage by the Khmer Rouge in the 1970s. Like Petitioner here, all of these people were persuaded that preservation of the past must be equated with an endorsement of that past. Because they did not agree with the ways of their ancestors, they thought it important to destroy their works. They could not reconcile their present views with the preservation of objects that reminded them that their ancestors had different views.

Fortunately, this is not the way most Americans think about the past. To the contrary, public and private institutions throughout the United States devote substantial resources not only to preserving buildings and monuments but also to informing and educating the public about those objects, the people who made them, and the times they lived in. Most of those public and private institutions do not accept the proposition that when they decide to preserve an object, they somehow "endorse" the values of its creators.

And – for the most part – those courts that have addressed this question specifically have been able to grasp

[11] As Karen Armstrong points out in her history of fundamentalism, *The Battle for God* 16-17 (Ballantine Books 2000), modern secularism can be "just as ferocious" as some medieval religions were and, ironically, has itself "been an important factor in the rise of militant fundamentalism."

the distinction. Certainly Judge Becker understood it and embraced it in *Freethought Society v. Chester County,* 334 F.3d 247, 261-62 (3d Cir. 2003) although he still felt compelled to consider the case under the "display" analysis that has been developed outside of and without reference to the preservation context. *Id.* at 261-70. Similarly, the Court of Appeals for the Ninth Circuit showed that it understood the distinction in upholding a present day governmental decision to preserve a sacred tribal site. "Defendant's policy does not convey endorsement or approval of the Tribes' religions," the Court held, going on to state what should be obvious to any neutral observer:

> Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole, much like Greece's preservation of the Parthenon, an ancient Greek temple of worship. Similarly, because of the central role of religion in human societies, many historical treasures are or were sites of religious worship. The Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, including the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.

Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 976 (9th Cir. 2004).[12]

Which is why – Petitioner's protestations to the contrary notwithstanding – no reasonable observer believes that Texas's preservation of the FOE monument means that Texas has taken an official position on, for example, the making of graven images or, for that matter, the keeping of the Sabbath. After all, if Texas is really serious about graven images, what is the Goddess of Liberty – representing Pallas Athena – doing on the top of the Texas Capitol? And how can the FOE monument's putative "instruction" to "remember the Sabbath to keep it holy" be squared with Texas's present-day policy on the Sunday activities of the Dallas Cowboys and their fans? All of which explains why most Americans *do not* accept the view that refusing to remove a monument is identical to "endorsing" what that monument says. To the contrary, most Americans know that it is possible to preserve and respect the works of one's ancestors without endorsing them. It is true the Taliban never understood that. But we are not the Taliban. And the Constitution does not require that we behave as if we were.

[12] Not all Ninth Circuit panels share this perception, however. In *Buono v. Norton*, 371 F.3d 543, 548-50 (9th Cir. 2004), a cross had been placed on federal land in 1934 by the Veterans of Foreign Wars to honor veterans who had died during World War I (as explained in a plaque nearby) and had been designated as a federal war memorial by the United States Congress. In that case, the Court of Appeals concluded that the designation of the cross as a war memorial did indeed "endorse" Christianity. *Id.* at 550. For one reason or other, it seems that some courts cannot tolerate the preservation of crosses as readily as they can accept preservation of other objects. *See, e.g., Gonzales v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1422 (7th Cir. 1993) (specifically disagreeing with the contention that "[t]he longer the cross is displayed in the Park, the more the effect is to memorialize rather than sermonize.")

C. The 1961 Decision to Erect the Monument Is Not Susceptible to Challenge Under Today's First Amendment Jurisprudence.

But what about the 1961 decision to accept the monument in the first place? Can Petitioner try to "get by" the preservation question he presented in 2001 and litigate instead a challenge to what the Texas legislature did forty years ago? Occasionally, courts have seemed to allow plaintiffs to do this, and, in the process, have applied today's law to yesterday's events. This is the wrong analysis, however, for at least three reasons.

First, if this is turned into a case about what the Texas Legislature did in 1961 – as opposed to what the State Preservation Board declined to do in 2001 – then all the rules and policies that prohibit the delayed assertion of state claims come squarely to the fore. If Petitioner – or anyone else for that matter – had a quarrel with what the legislature did in 1961, why wait until now to assert it? The point was not lost on the District Court – *see* 2002 U.S. Dist. LEXIS 26709 at *8-*9, and – once the question is limited to the events of 1961 – neither should it be lost on this Court. As this Court put it in a very different context some sixty years ago:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

In the present case, the inevitable decay of a record over time has given rise to the dispute about whether the "brief" statements located were sufficient to demonstrate a secular purpose or were instead "a sham." *Compare* 351 F.3d at 179 *with* Pet. Br. at 21. In actuality, such facts as the parties have been able to surface evidence only a lack of controversy over a decision that was unremarkable at the time. Nor can the blanks in the record then be filled in today.

Second, even if this Court were to decide it could discern the "true" motivation behind the events of 1961, it would need to decide which of its "precedents" should apply to those events. And, to be blunt, this question is more than a little awkward. The Establishment Clause, to be sure, has been in the Constitution since 1791. But the idea that that clause imposes a Constitutional restriction on a legislature's supposed "endorsement" of a religious text or sentiment is of much more recent vintage. And the fact is that the Texas Legislature of 1961 – whatever its "real" motive was in accepting the donation of the FOE monument – cannot fairly be accused of "making a law respecting the establishment of religion" as those words were understood by this Court in 1961.

It is worth noting, in this regard, that Petitioner has cited only a single case that was decided before 1961: *Everson v. Board of Education,* 330 U.S. 1 (1947). *Lemon v. Kurtzman,* the decision upon which the Fifth Circuit Court of Appeals' decision rested – and which animates almost all of the briefs filed by Petitioner's Amici – was decided in 1971. 403 U.S. 602 (1971) ("*Lemon I*"). And we know that *that* case cannot be applied to government decisions made in 1961, because this Court has already said so. *See Lemon v. Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"). The question presented in *Lemon II* was whether *Lemon I* should be applied retroactively. The Court held that it should not. So

we cannot pretend that that question is somehow open.[13] It would seem to follow, then, that if this Court plans to adjudicate a decision made by the Texas legislature in 1961, it will need to consider what it is that made that decision unconstitutional when it was made.

In considering *that* question, it is surely relevant that *no one* in the State of Texas perceived the erection of the monument in 1961 as raising a constitutional question. The dearth of legislative controversy – which the Petitioner cites as evidence of the "sham" and "pretext" in which the legislators engaged – has a much simpler explanation: the understanding of the First Amendment in 1961 was not what it is today, and no one thought that the receipt of a monument depicting the Ten Commandments on its face would be viewed as an establishment of religion. And that, indeed, is exactly what the cases decided by this Court in 1961 demonstrate.

For instance, while Petitioner argues in his brief that "any law" that imposed the Commandment to keep the Sabbath holy "would unquestionably violate the Establishment Clause," *see* Pet. Br. at 24, the fact is that back in 1961 this Court upheld Sunday closing laws in no less than three different cases. The 1961 understanding of the Establishment Clause is illustrated by Chief Justice Warren's observation in one of those cases:

> We are told that those provisions forbidding certain activities to be conducted within a set distance from a place of public worship are especially devoted to maintaining Sunday as the Sabbath. But because the State wishes to protect those who do worship on

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[13] It should be conceded that much like Petitioners' many Amici, the CCHPN's counsel, Drinker Biddle & Reath LLP, likes to cite *Lemon I* (which it won) rather than *Lemon II* (which it lost). Losing a case, however, does not mean one can pretend it was never decided or that it does not appear in the published decisions of this Court.

> Sunday does not mean that the State means to impose religious worship on all.

Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617, 627 (1961).[14]

Now it might well be both educational and entertaining for this Court to try to imagine itself as the Court of 1961 and to ponder how it might have dealt with a challenge to the resolution of the Texas legislature to accept the FOE monument had anyone thought to make such a challenge. But it is plainly the wrong task in this case. The fact that the 1961 Texas legislature did not violate any Constitutional precept as the Constitution was understood in 1961 is not an argument for applying 1961 laws; it is an argument for not adjudicating 1961 decisions over forty years after they are made.[15]

Third, if this Court were to decide to "skip" the preservation decision and go back to consider the older decision to pass the resolution accepting the FOE donation, it would mean that the Court has accepted the erroneous

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[14] The other cases were *McGowan v. Maryland*, 366 U.S. 420 (1961) and *Braunfeld v. Brown*, 366 U.S. 599 (1961).

[15] This Court wrestles fairly regularly with the rare instances in which it is appropriate to require a state to accord deference to this Court's changed interpretations of what is and is not constitutional. *Compare, e.g., Beard v. Banks*, 124 S. Ct. 2504 (June 24, 2004) (holding that *Mills v. Maryland*, 486 U.S. 367 (1988) may not be applied retroactively to provide relief to a habeas petitioner under the analysis set forth in *Teague v. Lane*, 489 U.S. 288 (1989)) *with Hamling v. United States*, 418 U.S. 87 (1974) (applying the standard of obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973), decided while *Hamling* was on direct review). But the interests in finality and federalism that undergird the Court's reluctance to find exceptions to *Teague* or to apply *Lemon I* retroactively at a minimum counsel against examining the decision made by the State of Texas in 1961 under today's interpretation of the First Amendment.

argument that any decision made about preserving an object necessarily entails "endorsement" of that object and its content. By accepting "proof" of what the Texas Legislature intended in 1961 as probative of what the State Preservation Board was doing in 2001, the Court necessarily reduces preservation itself to a sham – which, of course, is exactly what Petitioner and his Amici say it is.

Contrary to Petitioner's implication, however, Texas's commitment to preservation is anything but pretextual. In fact, it is demonstrably both long-standing and constitutional. At the time when the monument was received, three separate constitutional provisions of the Constitution of 1876 "expressed the obligation of the government to preserve the evidences of Texas' historical heritage."[16] *San Antonio Conservation Society, Inc. v. City of San Antonio*, 455 S.W.2d 743, 746 (Tex. 1970). To achieve tax exempt status in Texas, a charity must not only serve the public good, but assume "to a material extent that which otherwise might become the obligation or duty of the community or state." *Id.* The Texas Supreme Court has found that historic preservation satisfies the requirement. In the process, it recounted some of the preserved sites and what they meant to Texas history:

> Palo Duro Canyon State Scenic Park and the Meridian State Park preserve the prehistoric and Indian eras. Indianola State Historic Park is the site of Spanish and French settlements. Mission San Francisco de los Tejas State Historical Park marks the place of the first Spanish missions established in

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[16] Two of the three sections, those providing for a commissioner of Insurance, Statistics and History (former Art. XVI, sec. 38) and regarding historical records, rolls and documents (former Art. XVI, sec. 45) have since been removed. Art. XVI. Sec. 39 is still a part of the Constitution, however. It provides that the "Legislature may, from time to time, make appropriations for preserving and perpetuating memorials of the history of Texas, by means of monuments, statues, paintings and documents of historical value." *Id.*

> East Texas in 1690. San Jose Mission State and National Historic Site preserves the mission established in 1720 during Spain's great colonial power.

Id. at 747.

If this Court were to ignore preservation as preservation and, instead, go back to evaluate the original decision to build a building or create an object, much of what Texas seeks to preserve will ultimately need to be demolished. Certainly neither the Texas nor the California Spanish missions will survive the new judicial wrecking ball. Those places meet all the criteria Petitioner wishes to establish here; they are overtly and unambiguously religious – in fact, they (unlike the Ten Commandments monument) are facially sectarian. No one has to research scriptural translations to recognize that the missions are exclusively Roman Catholic. And, lest there be any doubt as to what is at issue here, one of Petitioner's Amici has just mounted such an assault on federal efforts to preserve the historic missions of California. *See Doe v. Norton*, 1:04-cv-02089-RJL (D.D.C., Unredacted Complaint filed under Seal Dec. 2, 2004) (challenging the decision of the federal government to bear a portion of the cost – through historic preservation funds – of ensuring the structural integrity and restoring the artwork of California's 21 historic missions).[17] All of which, with all due respect, is the very best reason to evaluate preservation decisions for what they are – preservation decisions – and not to try to apply present day law and prejudices to the original construction or creation of objects long ago.

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[17] As Plaintiffs in that case put it: "By providing federal funds only for the restoration and repair of Catholic missions (and their associated religious artwork and artifacts) and not secular or other non-Catholic sites, artwork, or artifacts, the Act defines eligibility for federal benefits with reference to religion, and is therefore non-neutral both among religions and between religion and non-religion, in violation of the Establishment Clause." Redacted Complaint, ¶ 29.

D. The Constitution Does Not Require That Government Discriminate Against Religion in Making Preservation Decisions.

What Petitioner seeks would impose an additional filter for all preservation decisions, one that excludes religious objects and texts *per se*. This is not only substituting judicial appraisal of historical significance and aesthetic value for that of experts such as the Curator contemplated by the Texas legislature, it is also singling out religion for especial onus. But it is well-settled that religious thoughts and ideas are not constitutionally disfavored. *See Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001). The Constitution neither demands nor tolerates antipathy toward religion. As Petitioner recognizes, this Court's jurisprudence equally forbids a governmental purpose to "disapprove of religion." Pet. Br. at 20 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)). Imposing Petitioner's requirement that only secular objects can be worthy of preservation would impose just such unconstitutional governmental disapproval. Recognizing that our heritage has been impacted by diverse ideas, even those that are disturbing, is inherently an objective exercise: it does not opine on how the world should be, but recognizes how certain people or movements or events were and the places and circumstances in which they occurred. Such objectivity is the very essence of the neutrality the Constitution requires and protects.

Now the fact is that this country's history includes the history of religious people, many of them undeniably "sectarian" in one way or another. While the missions in Texas and California are obviously Roman Catholic, Quaker meeting houses and documents in Pennsylvania just as obviously are not. Similarly, the Puritans left Puritan objects and monuments behind them. All these people were who they were. Those who try to preserve their works cannot be expected to edit out the religious parts to

render our forebears more palatable to Petitioner and his Amici.

Moreover, elected leaders voice religious thoughts and ideas all the time. They even do so in public places and on public occasions. The greatest speech ever given by an American president was delivered by Abraham Lincoln upon the inauguration of his second term. His thesis was that the Civil War could only be understood as the judgment of God upon the national sin of slavery. He quoted Genesis 3:19, Matthew 7:1, Matthew 18:7, Hebrews 12:6 and Psalms 19:9.[18] And the whole thing – every word – is engraved on the wall of the Lincoln Memorial. Petitioner may well find the patently religious aspects of this speech to be "offensive." But his countrymen do not. And no judge has yet summoned the courage to order it redacted.

That the government can and does preserve existing buildings, monuments, or markers is a universally accepted proposition. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).[19] Surely it is no surprise that

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[18] For an exhaustive analysis of the religious roots of and the theological argument contained in Lincoln's Second Inaugural, see Ronald C. White, *Lincoln's Greatest Speech: the Second Inaugural* (Simon & Schuster 2002).

[19] The Congressional findings that preface the National Historic Preservation Act begin with these:

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

. . .

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic and energy benefits will be maintained and enriched for future generations of Americans;

16 U.S.C. § 470. On the basis of those findings, Congress developed its preservation policy, to be carried out "in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations." 16 U.S.C. § 470-1. As part of that policy, the National Register of Historic Places was established to register "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture." 16 U.S.C. § 470a(a)(1)(A).

the United States government and state and local governments spend tax dollars every day on the preservation of all sorts of objects. These objects include Bibles, prayer books, totem poles, religious statues, sacred clothing, churches, meeting houses, burial mounds, paintings – and all kinds of inscriptions, markers, plaques and monuments. And the Library of Congress and the Smithsonian Institution are full of "offensive" objects the government works very hard to preserve. And no one thinks that the government acts unconstitutionally by doing what it does. The Constitution does not impose an affirmative duty upon the government to weed out the "religious" works of the past and preserve only those that are religion-free.

Like Texas, most preservationists throughout the country make decisions with a blind eye to religion. Indeed, sometimes historic status can be a burden for a property owner, and that burden – like the benefit – applies to religious properties or property owners as it does for anyone. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (unconstitutional to apply a different standard of scrutiny to facially neutral historic district building restrictions); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (church subject to landmarks law); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (government required to consider religious and cultural significance before declining to register site as historic). History is found where it is found. The Old North Church in Boston is indisputably a "religious" building. It was also recently restored with federal dollars. That was money well spent. And there was nothing unconstitutional about it.

E. The Determination of What is Historically Significant is Not a Decision for the Courts.

But does the FOE monument really have any historic value? It is a fair question. For even if the logic of Petitioner's argument could justify the destruction of the Buddhas of Bamiyan, seventeenth century Spanish missions, Old North Church and the Lincoln Memorial, it is true that Petitioner himself has chosen a less exalted target. The FOE Memorial is not all that "historic." And it isn't even one of a kind.

It does not follow, however, that the Texas State Preservation Board erred when it decided to preserve the monument. Just as Abraham Lincoln is part of our history, so are Judge Ruegemer and Cecil B. DeMille. Markers evidencing twentieth century enthusiasm for the Ten Commandments tell their own stories of their own times. The marker affixed to the Chester County Courthouse in 1920 was part of a campaign by a liberal evangelical organization known as the International Reform Bureau. Led by a former protégé of the great abolitionist preacher Henry Ward Beecher, the IRB was devoted to a number of liberal causes including the adoption of Child Labor Laws, the ratification of the League of Nations Treaty, and a proposed Constitutional Amendment to prohibit the use of public monies in "sectarian" (by which was meant Roman Catholic) schools. Its enthusiasm for the Ten Commandments reflected both its strong Sabbatarian views and its advocacy of universal or "international" law, which, it thought, the Ten Commandments represented.[20]

Judge Ruegemer, Cecil B. DeMille and the FOE campaign come a generation later and reflect a curious mid-century solution for juvenile delinquency. Judge

[20] The record of the IRB was originally proffered to the District Court for the Western District of Pennsylvania in *Modrovich v. Allegheny County*, the decision of which was affirmed by the Third Circuit Court of Appeals at 385 F.3d 397 (3d Cir. 2004). In point of fact, each monument and each plaque on each historic landmark has its own story.

Ruegemer's perception of the problem – using moral suasion and a job to counteract an underprivileged childhood rather than relegating a youth to a Reformatory – reflects the liberal optimism of the 1950s. It is true that the social activism of the IRB and the reformers of the 1950s was often informed by their religious views. As, indeed, was that of notable abolitionists and suffragists in an earlier era. But is it intellectually honest to affirm the social change but deny that its proponents were ever prompted by religious motives? Respectfully, the impulse to eliminate any and all evidence that then might have been different from now is exactly the kind of impulse that a State Preservation Board ought to be resisting.

So is the FOE monument worth preserving? There are really two answers to that question. The first is suggested by Alexander Stille in *The Future of the Past* at 256-60. In discussing the destruction of so many ancient texts at the Great Library of Alexandria – a loss that he puts at forty texts lost for each one saved – Stille doesn't blame Christian or Muslim mobs as much as the copyists trying to preserve the texts. It seems that papyri naturally tend to degrade over time and the copyists had a tendency to copy onto new papyri only those texts that they thought worth preserving. As a result, those they considered less important or useful did not survive. The tragedy is that, in retrospect, the copyists' judgment as to what was not worth preserving almost certainly does not coincide with our own. It seems that what we value changes over time. Perhaps the Texas State Preservation Board knows that. Most preservationists do.

Which brings us to the second answer to the question whether the FOE monument is worth preserving, which, it turns out, is itself a question: Who decides? Petitioner seems to believe that judges decide. And it may be that that answer has a certain appeal to judges, or at least to some of them. But it is not the right answer. It may well be that the preservationists will get the answers wrong from time to time, just as the ancient copyists did. But their bias is a bias

in favor of preservation. It is not a bias for or against any particular religious view. And it is to them – not to the federal judiciary – that our elected representatives have entrusted preservation decisions.

Nor have they unleashed untrained persons to make haphazard decisions without parameters or guidance. The Department of Interior has established extensive criteria that govern federal, state, and local preservation decisions. There are specific instructions for "how to evaluate a property within its historic context," including a long list of "areas of significance."[21] By applying the same criteria to religious buildings, markers, and objects that they apply to non-religious buildings, markers, and objects, preservationists seek to ensure, insofar as is possible, that what future generations view accurately reflects the history it purports to represent.[22] With all due respect, the decision to allocate such determinations to preservationists and curators is the right decision. But even if it were in doubt, it is a decision this Court should respect. The Texas State Preservation Board acted within the authority given to it by the people of Texas.[23] Petitioner has given this Court no good reason to countermand their judgment.

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[21] *See* United States Department of Interior, National Park Service, National Register Bulletin No. 15, "How to Apply the National Register Criteria for Evaluation" at http://www.cr.nps.gov/nr/publications/bulletins/nrb15/.

[22] In the present case, the Capitol grounds were part of the Capitol and the monument part of the grounds when the Capitol was listed on the National Register. As such, it is much like a notch in an old gun butt. One does not "preserve" the gun butt by removing the notch. To the contrary, the notch is part of the history of the gun. Eliminating it does not "restore" the gun, it changes it – for the worse – by eradicating a part of its history. Or that, in any case, is how a preservationist sees the question.

[23] By statute, it is a Curator (whose qualifications and duties are defined by law, *see* Tex. Gov't Code § 443.006) who is vested with the responsibility to acquire and maintain items of historical significance, among them monuments – defined by Texas law as "a marker, memorial, statue, or other commemoration of a person, organization, or event." Tex. Gov't Code § 443.0152.

V. CONCLUSION

The Establishment Clause is not a directive to federal judges to become Red Guards in black robes and root out all evidence of our ancestors' religious thoughts and ideas. In fact, the United States Constitution says nothing at all about which remnants of the past should be kept, and which, if any, discarded. Preserving history has nothing to do with "endorsing" any particular ideology; it is a good in itself. The Fifth Commandment tells us "to honor thy father and thy mother." If the people of Texas wish to keep that commandment – and they do – the Constitution cannot even plausibly be read to stand in their way.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
JAN 31 2005
OFFICE OF THE CLERK

No. 03-1500

In The

Supreme Court of the United States

THOMAS VAN ORDEN

Petitioner,

v.

RICK PERRY, IN HIS CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property of a monument featuring a nonsectarian version of the Ten Commandments where the monument is presented with other statuary, plaques, and seals depicting both the secular and religious history of Texas?

2. Whether this Court's recent federalism jurisprudence can be interpreted to apply the Establishment Clause of the First Amendment to the states in the same manner as to the federal government?

3. Whether the Ten Commandments or any other public tribute to America's historical, religiously-based, founding principles can be considered sectarian in light of Founding-era expressions marking the distinctions between national efforts to impose a religion and local expressions honoring America's religiously influenced political origins?

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion?

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No. 03-1500

In The

Supreme Court of the United States

THOMAS VAN ORDEN

Petitioner,

RICK PERRY, GOV. OF TEXAS, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Respondents

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle at issue in this case that just governments are established to protect the unalienable rights with which all human beings "are endowed by

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

their Creator." The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, on the importance—and constitutionality—of public devotion to moral and religious principles as a necessary precondition to maintaining liberty and our republican form of government, including HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); Larry P. Arnn and Douglas A. Jeffrey, *"We Pledge Allegiance"—American Christians and Patriotic Citizenship*; DANIEL C. PALM, ED., ON FAITH AND FREE GOVERNMENT (1997); and John C. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being,"* 5 NEXUS: J. OPINION 13 (Fall 2000).

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S.Ct. 2301 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), and *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000).

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment, as originally conceived, barred the federal government from establishing a national church and from otherwise interfering with the States should the latter choose to cooperate with religious institutions in the exercise of their core state police power to foster the health, safety, welfare, and morals of the people. In other words, it was as much a federalism provision as a substantive bar to a national church. Although the

Fourteenth Amendment fundamentally changed the relationship between the federal government and the States, making the federal government a guarantor of individual rights against State infringement, the Establishment Clause is not like the other provisions of the Bill of Rights that have been incorporated and made applicable to the States as fundamental liberty interests. It simply cannot be incorporated without radically repudiating its federalism aspects, requiring the federal courts to intrude upon core areas of state sovereignty in a way never intended by either the drafters or ratifiers of that amendment.

Religion has historically played an important role in fostering the very moral virtues the Founders thought so essential to the survival of self-government in our nation. The Ten Commandments has historically been viewed as an important source of American law, if not, in the words of one lower court, "the most important, source of American law." *Glassroth* v. *Moore*, 229 F. Supp. 2d 1290, 1292 (2002), *aff'd*, 335 F.3d 1282 (CA11 2003). Thus, the proper interpretation of the Establishment Clause, if it is to be applied to the States at all, must recognize the importance of religion in the exercise of the States' core police powers. Actions by state and local governments should therefore be evaluated differently than the same action if done by the federal government. The Establishment Clause simply cannot apply to the States in the same manner as it applies to the federal government without circumventing the very thing the Clause was arguably designed to prevent, namely, federal interference with state support of religion. As such, a statehouse monument depicting the "moral foundation of law," which includes a carving of the Ten Commandments along with other, non-sectarian sources of moral authority, does not violate the Establishment Clause.

ARGUMENT

I. This Court Needs to Revisit the Propriety of Incorporating the Establishment Clause.

A. The Establishment Clause Was Designed to Prevent the Federal Government from Interfering with State Support of Religion.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli* v. *New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall make no law respecting the establishment of religion," was designed with a two-fold purpose: First, to prevent the federal government from establishing a national church; and second, to prevent the federal government from interfering with the state-established churches and other state aid to religion that existed at the time. *See, e.g.*, W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); M. HOWE, THE GARDEN AND THE WILDERNESS 23 (1965) (both cited in G. Stone, et. al., eds., Constitutional Law 1539 (3d ed. 1996)).

Of course, the Fourteenth Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. The Free Exercise clause of the First Amendment invites incorporation, for example, as it deals with individual rights warranting protection from intrusion by government at any level. *See* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1159 (1991). As such, incorporation of

this right through the Fourteenth Amendment's guarantee of liberty (or perhaps, more properly, is guaranty of the privileges of citizenship) is consistent with the intent of the framers of that amendment to secure fundamental rights, privileges and immunities from interference by state governments. "That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth Amendment—is the safeguarding of individual's right to free exercise of his religion has been consistently recognized." *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

The Establishment Clause, however, is on its face different in kind from other provisions that have previously been incorporated and made applicable to the states via the Fourteenth Amendment. It was designed as a two-fold restraint on Congress, prohibiting not just the establishment of a national church but also other means by which the federal government might interfere with existing state-supported religion. In other words, the Clause was designed to reserve religious matters to the people of the States and the state governments they established.

Justice Thomas's observation in *Newdow* that "the Establishment Clause is a federalism provision, which, for this reason, *resists incorporation*" is therefore compelled by the original understanding of the Clause. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2328 (2004) (Thomas, J., dissenting) (emphasis added). Any other approach yields the peculiar interpretation of the Establishment Clause that has allowed the federal courts and, via section 5 of the Fourteenth Amendment, the Congress, to do the very thing the clause was arguably designed to prevent, namely: interfere with state support of religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); *see also Newdow*, 124 S. Ct., at 2332 (Thomas, J., concurring) (not-

ing the irony "that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy") (citing *Schempp*, 374 U.S. at 310) (Stewart, J., dissenting).

Thus, even if the public display of the Ten Commandments was unconstitutional when done by the federal government, *but see County of Allegheny* v. *ACLU*, 492 U.S. 573, 652-53 (1989), such an interpretation in the incorporated Establishment Clause context would intrude upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the Fourteenth Amendment. "Whenever the Judiciary [breathes still further substantive content into the Due Process Clause] it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore* v. *East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting); *see also Newdow*, 124 S. Ct., at 2320 (Rehnquist, C.J., concurring in the judgment) ("When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies").

In holding that the Establishment Clause was nonetheless incorporated by the Fourteenth Amendment as a restraint on the States, this Court in *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947), merely cited prior Free Speech and Free Exercise cases without so much as a word of analysis of the obvious differences between the clauses. Such an analysis, if one is possible at all, is long overdue.

B. If It Applies at All, the Establishment Clause Should Not Apply to the States In the Same Manner that It Applies to the Federal Government.

If the Establishment Clause is to apply to the States at all, the scope of prohibited activity must simply be narrower

than that prohibited to the Federal Government, in order for the States to be able to exercise core police powers reserved to them in our federal system. In other words, this Court should reconsider whether the Clause can continue to be treated as fully incorporated, jot-for-jot, without running afoul both of the original understanding of the First and Fourteenth Amendments and this Court's recent federalism decisions. Justice Thomas's concurring opinions in *Newdow* and *Zelman* persuasively demonstrate that it cannot be.

It is well established and recently reaffirmed that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the States or to the people. *See e.g., United States* v. *Lopez*, 514 U.S. 549, 552 (1995); U.S. Const. Amend. X. As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects...The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (J. Madison) (Clinton Rossiter, ed., 1961). It is equally well settled that chief among the powers reserved to the States is the police power—the power to protect the "safety, health, peace, good order, and morals of the community." *Cowley* v. *Christensen*, 137 U.S. 86, 89 (1898); *see also, e.g., Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *New State Ice Co.*, v. *Liebmann*, 285 U.S. 262, 304 (1932). Moreover, the fostering of morality among the citizenry, particularly that fostered by religion, has for most of our nation's history been viewed as an essen-

tial component of that core State function. Thus, any proper interpretation of the Establishment Clause as applied to the States simply must recognize the important role religion has always played in State efforts to undertake this core police power.

In exercising their power to regulate the health, safety, welfare and, particularly, the morals of the people, States have employed a wide variety of means, including lending support to religious institutions. *See, e.g.*, Pa. Const. of 1776, § 45. States have often been referred to as "experimental social laboratories." *Roth* v. *United States*, 354 U.S 476, 505 (1957) (Harlan, J., dissenting). As such, "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Therefore, while the Federal Government may "make no law respecting the establishment of religion," the States should be able to "pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." *Zelman*, 526 U.S., at 679 (Thomas, J., concurring).

Several members of this Court have recognized this important distinction between state and federal action in other First Amendment contexts. Justice Harlan, for example, stated in *Roth*: "I do not think it follows that state and federal powers in this area [First Amendment incorporated to the States by the Fourteenth Amendment] are the same." *Roth*, 354 U.S., at 503. Justice Jackson put it more bluntly, convinced "that the Fourteenth Amendment did not 'incorporate' the First [Amendment's Free Speech Clause], that the powers of Congress and of the States over [the subject of criminal libel] are not of the same dimensions, and that because Congress probably could not enact this law it does not

follow that the States may not." *Beauharnais v. Illinois*, 343 U.S. 250, 288 (1951) (Jackson, J., dissenting).

What is true for the Free Speech Clause is even more true for the Establishment Clause: Wholesale incorporation not only intrudes upon State powers well beyond what was envisioned by the adopters of the Fourteenth Amendment, but it undermines the ability of the States to protect the health, safety, welfare, and morals of the people, and as described below, threatens the very foundations of republican self-government.

II. Promoting Morality in the Citizenry is Essential to the Preservation of a Republican Form of Government.

America's founders believed that moral virtue was an essential pre-condition of republican self-government. For example, the Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776 provides: "That no free government, or the blessings of liberty, can be reserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec. 15. The Massachusetts Constitution of 1780 echoes this sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depends upon piety, religion, and morality...." Mass. Const. of 1780, Pt. 1, Art. 3. Mercy Otis Warren, "First Lady of the American Revolution," warned against the decline of republican virtue in her three volume history of the American Revolution, writing that "a violation of manners [morals] has destroyed more states than the infraction of laws." Mercy Otis Warren, "History of the Rise, Progress, and Termination of the American Revolution," *reprinted in* WILLIAM J. BENNETT, OUR SACRED HONOR 376 (1997).

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of the Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (Clinton Rossiter ed., 1961).

One need not be religious in order to be virtuous, of course, but the fostering of moral excellence across the entire citizenry was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address (1796), *reprinted in* WILLIAM B. ALLEN, ED., GEORGE WASHINGTON: A COLLECTION 512, 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12 1787), *reprinted in* MERRILL JENSON, ED., 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 595 (1976); *see also* Benjamin Rush, "*Of the Mode of Education Proper in a Republic*" (1798) , *reprinted in* BENNETT, OUR SACRED HONOR, at 412 (noting "that all doctrines and precepts [of Christian revelation] are calculated to promote the happiness of society, and the safety and well being of civil government").

Richard Henry Lee, representative from Virginia to the Continental Congress, wrote to James Madison that "[r]efiners may weave as fine a web of reason as they please, but the

but the experience of all times shows Religion to be the guardian of morals." Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), *reprinted in* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 44 (1985). John Adams was likewise emphatic: "I say then that . . . without national morality a republican government cannot be maintained." Letter from John Adams to Benjamin Rush (Feb. 2, 1807), *reprinted in* BENNETT, OUR SACRED HONOR, at 408-409.

Justice Joseph Story also recognized the importance of religion to the perpetuation of America's civic institutions:

> Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions founded upon moral freedom and accountability; a future states of rewards and punishments; the cultivation of all the personal social and benevolent virtues—these can never be matters of indifference in any well-ordered community. Indeed it is difficult to conceive how any society can exist without them.

JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch. 44, § 1865 (1833). Alexis de Tocqueville reached a similar conclusion in his insightful commentary a generation after the founding, noting that while he did not know if all Americans had faith in their religion, he was "sure that they think it necessary to the maintenance of republican institutions," a sentiment that he found to be "not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks." ALEXIS DE TOC-

QUEVILLE, 1 DEMOCRACY IN AMERICA, Pt. 2, ch. 9, p. 280 (Mansfield and Winthrop trans., 2000) (1835).

Moreover, the Founders were fully cognizant of the fact that religious virtue must be continually fostered in order for republican institutions, once established, to survive. The best example of this sentiment is expressed in the Northwest Ordinance, adopted by the Continental Congress in 1787 (and re-adopted by the First Congress in 1789) for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of exaction shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n.a. (July 13, 1787, re-enacted Aug. 7, 1789).

In addition, several States explicitly provided for the protection and *encouragement* of religion in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected").

Even today, many States continue to recognize the importance of morality and the role in which religion plays in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1 § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination"); Vt. Const. Ch. II § 68 ("Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force...All religious

societies...shall be encouraged and protected"). The State of Texas itself likewise provides in its Constitution that "All men have a natural and indefeasible *right to worship Almighty God* according to the dictates of their own consciences." Tex. Const. Art. I § 6 (emphasis added). It is thus no accident that the constitutions of almost every State, both historically and currently, include some form of acknowledgement of the Almighty's role in bestowing the blessings of liberty upon the State's citizens. *See, e.g.*, Texas Const., Preamble ("Humbly invoking the blessings of Almighty God"); New York Const., Preamble ("We the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution"); New Jersey Const., Preamble ("We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution"); California Const., Preamble ("grateful to Almighty God for our freedom in order to secure and perpetuate its blessings").

These provisions are more than just historical relics. They manifest a deep—and continuing—commitment on the part of the American people to inculcate moral virtue in the citizenry and to acknowledge the importance of religion in that task. It would be odd indeed to attribute to the Establishment Clause of the First Amendment an interpretation that would render so much of the other work and pronouncements by the very men who drafted it an unconstitutional nullity.

III. The Ten Commandments Are A Cornerstone of Our National Law

The Ten Commandments have traditionally been viewed as the cornerstone of our national law. *City of Elkhart* v.

Books, 532 U.S. 1058, 121 S.Ct. 2209, 2212 (2001) (Rehnquist, C.J., dissent from denial of certiorari) (describing "the foundational role of the Ten Commandments in secular, legal matters"); *State* v. *Freedom From Religion Foundation*, 898 P.2d 1013 (Colo. 1995) (describing "the historical fact that the Ten Commandments have served over time as the basis for our national law"); *see also* JOHN T. NOONAN, JR., THE BELIEVERS AND THE POWERS THAT ARE 4 (1987). Its proscriptions embrace the very virtues the Founders regarded as necessary to the preservation of free government.

Moreover, depictions of the Ten Commandments are frequently found in state and federal buildings alike, because of their importance to American law. For example, the courtroom of the United States Supreme Court itself contains a marble frieze depicting Moses holding the Ten Commandments. *City of Elkhart*, 121 S.Ct., at 2212 (Rehnquist, C.J., dissent from denial of certiorari); *County of Allegheny*, 492 U.S., at 652-53. Although the frieze on the South wall of the Courtroom depicts Moses as merely one among many prominent lawgivers from throughout history, the Ten Commandments is also depicted a second time in the central place of prominence:

> In the very center of the relief, high over the seat of the Chief Justice, is a symbolic figure balancing a rounded tablet containing ten Roman numerals. The image is as unmistakable as the message it portrays: the Ten Commandments, a religious document central to Jewish and Christian faiths, is being offered as a primary source of American law.

Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. OF LAW & RELIGION 525, 525 (1999-2000). Similarly, Moses and the Ten Commandments are depicted in the center of the pediment above the East entrance of the Supreme

Court, flanked by Confucius and Solon. Supreme Court Curator, The East Pediment: Information Sheet (available at http://www.supremecourtus.gov/about/eastpediment.pdf). In front of the E. Barrett Prettyman Building which houses the D.C. Circuit Court is another depiction of the Ten Commandments, this time in its original Hebrew. *Glassroth*, 229 F.Supp.2d, at 1300. And inside the courtroom of the Pennsylvania Supreme Court is a display containing a full version of the text of the Ten Commandments, accompanied by a picture of Moses carving those Commandments. *Id.*

In light of the recognized importance of virtue in the republic, the role in which religion plays in promoting such virtue, and the historical presence of the Ten Commandments, treating as unconstitutional a display that includes a monument of the Ten Commandments, would be unfounded. Indeed, from the Founders' vantage point, the exclusion from our public discourse and institutions of moral precepts such as those manifested through the Ten Commandments, precepts they believed absolutely essential to the perpetuation of a republican form of government, would have undermined, perhaps fatally, their entire experiment in self-government.

IV. Public Display of the Ten Commandments Is Not the Kind of Sectarian Preference Prohibited by the Establishment Clause.

Even assuming that this Court continues to apply the incorporated Establishment Clause to the States in the same manner as it applies to the federal government, the public display of the Ten Commandments on county property does not create the kind of sectarian establishment that was the target of the First Amendment.

Joseph Story aptly described the original understanding of the Clause, as follows:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions and to make it a matter of state policy to hold all in utter indifference would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

JOSEPH STORY, 3 COMMENTARIES, § 1868; *see also Wallace* v. *Jaffree*, 472 U.S. 38, 104-105 (1985) (Rehnquist, J., dissenting) (quoting Joseph Story, 2 Commentaries on the Constitution of the United States 630-32 (5th ed. 1891)).

This nation has long embraced acknowledgements of religion in American life, without doubt (until recently) as to their constitutionality. In *Lynch v. Donnelly*, 465 U.S. 668, 676-678 (1984), for example, this Court acknowledged generally acceptable and constitutionally permissible expressions of religion in national life as congressional proclamations alluding to the religious significance of national holidays and presidential proclamations recognizing a "National Day of Prayer." The Seventh Circuit contemplated these American cultural norms when deciding if funds to provide a prayer room in the Illinois state capitol were appropriate, holding: "We do not think that a federal court should intrude itself into the internal spiritual affairs of a state legislature until there is some indication that general statements of religious sentiments will give rise to concrete manifestations of unacceptable sectarian motives." *Van Zandt v. Thompson*, 839 F.2d 1215, 1221-1222 (CA7 1988) (citing *Mueller v.*

Allen, 468 U.S. 388, 394 (1983)). The relevant inquiry is whether a particular public religious act advances a *sectarian* agenda or whether it simply acknowledges or even fosters the *generally accepted* religious views upon which America's political institutions are grounded.

Again, Tocqueville offered an incisive exposition of this dichotomy between personal worship and national incorporation of the religious precepts that imbue American ideals. "There is an innumerable multitude of sects in the United States. They are all different in the worship they offer to the Creator, but all agree concerning the duties of men to one another. Each sect worships God in its own fashion, but all preach the same morality in the name of God." TOCQUEVILLE, 1 DEMOCRACY IN AMERICA, at 278. This phenomenon has mystified those who have tried to discern the origins of America's religious tolerance. The answer can simply be found in America's mooring in ageless principles and ubiquitous acknowledgment of Providential guidance, a guidance affirmed in every judicial proceeding before the Texas Supreme Court: "As God was to our fathers, may He also be to us." *Van Orden* v. *Perry*, 351 F.3d 173, 176 (CA5 2003) (translating the Latin motto inscribed above the bench in the Texas Supreme Courthouse).

The United States has prospered by a national creed that declares God-given, inalienable rights to every individual. One of those rights, underwritten by the tenets of this creed, is the right to choose the manner of worship—or to choose not to worship at all. Yet those who would choose the latter course cannot be given a heckler's veto over those who follow the former path.

This Court has previously recognized the importance of upholding national symbols of historic and unifying value while, at the same time, accommodating the objector whose religious tenets did not allow for a public expression of loyalty to a particular symbol, the American flag. The objector

in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), was simply allowed the right to opt-out of the Pledge of Allegiance rather than being given the power to dictate whether the pledge was recited in the classroom or what words were included in it. Starting from a baseline that the "Bill of Rights was to withdraw certain subjects [freedom of worship and assembly] from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles . . . ," this Court affirmed that certain "fundamental rights [that] may not be submitted to vote; they depend on the outcome of no elections." *Id.*, at 638. But the *Barnette* Court did not diminish the significance of the flag salute when making allowance for students whose religious dictates did not allow participation, citing "the real unity of America" as coming from "persuasion and example," while still recognizing the "sufficiently definite and tangible value" that accrued to society from the symbolic ritual of pledging allegiance to the American flag. *Id.* at 640, 646. As *Barnette* proves, consideration of individual religious expression (or lack thereof) need not compromise open national embrace of American founding principles and historic religious ideals.

The exclusion of important and instructive historic symbols, many imbued with religious significance in fidelity to the precepts of American government order, simply does not comport with the original understanding of the Establishment Clause as a prohibition on compelled belief or stark sectarian preference. Following that original view, the acknowledgement of the historical role played by this religious symbol, common to a wide variety of religious sects, simply does not run afoul of the Establishment Clause.

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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(7)

Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

No. 03-1500

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Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE COUNCIL FOR SECULAR HUMANISM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THOMAS VAN ORDEN

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property, between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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BRIEF OF THE COUNCIL FOR SECULAR HUMANISM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER THOMAS VAN ORDEN

INTEREST OF THE *AMICUS CURIAE*

The Council for Secular Humanism (hereinafter "Council") is a non-profit educational organization based in Amherst, New York, with affiliates all over the United States and the world. The Council is the largest organization in the world representing the interests of nonbelievers.[1]

[1] This brief is filed with the consent of the parties, and letters evidencing such consent have been filed with the Court. Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authorized this brief in whole or in part and that no person or party other than the *Amicus* or its counsel has made a monetary contribution to this brief's preparation or submission.

The growth of the Council reflects just one aspect of the increasing diversity of religious and nonreligious beliefs in this country. There are many Americans, in addition to atheists, who do not believe in the Biblical deity glorified in the Ten Commandments. There are Buddhists and Taoists who have no single supreme being. There are Hindus who believe in a pantheon of deities. There are Muslims who do not regard the Biblical deity as their appropriate object of worship but rather favor the Quranic Allah. The placing of the Ten Commandments on public property, particularly in government centers that are the seats of power for a state, as is the case here, relegates all these Americans to second-class citizenship.

The Council is concerned that no nonbeliever and no member of a religious minority ever suffer a sense of outsider status as a consequence of a government display of a religious symbol on public property, particularly public property that represents the center of government for the nation, a state, or a given locality. To claim that the Ten Commandments is not a religious expression is to avoid the logic of what it says. To place it on public property, on government property that constitutes the locus of a state's government, is for that state to communicate outsider status to religious dissenters and to atheists.

SUMMARY OF ARGUMENT

Since 1947, this Supreme Court has consistently held that no branch of government can in any way favor religious belief or religious believers over nonbelief or nonbelievers. Most recently, this Court has held that no branch of government may communicate the message to anyone that because of either accepting or rejecting any religious belief "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-310 (2000), quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Displaying the Ten Commandments at a crucial physical location on state seat-of-government grounds, so as to convey that the Decalogue is an integral founding component of the state's legal system, does favor belief over nonbelief and does communicate to those who do not believe in Biblical religion that they are outsiders.

This Court has already defined the Ten Commandments as a religious expression, and thus the State of Texas cannot constitutionally convey the impression that it endorses these Commandments.

This Court has, in recent years, denied *certiorari* and refused to disturb or alter, in any way, the result in three other cases, from the 6th, 7th, and 11th Circuits, respectively, in which each such Circuit found a Ten Commandments display unconstitutional in circumstances virtually identical to the instant case.

The location of this Ten Commandments monument in a strategic position on state seat-of-government grounds, on a straight line between the Legislature, Governor's offices, and the Texas Supreme Court, impermissibly conveys the impression that the state endorses the Decalogue as undergirding the Texas legal system.

The display of the Ten Commandments, at issue here, entails state action that does not have a secular purpose, that has a primary purpose of advancing religion, and that excessively entangles government with the promotion of religious beliefs.

If this Court allows such an overt linkage of a state's legal system with a religious mandate, then this Court will have to address exactly what, if any, are the rights that believers have in our country that nonbelievers don't have. This could open the door to tremendous civil strife. If the government can in

any way favor the believer more than the nonbeliever, or the Bible believer more than a member of some religious minority, there is then the ominous shadow of shunting the nonbeliever or religious dissenter into second-class citizenship, which, itself, would signify the onset of religious tyranny.

Amicus thus asks this Honorable Supreme Court to reverse the decision of the 5th Circuit and thereby compel the State of Texas to remove the Ten Commandments monument at issue in this case.

ARGUMENT

I. NO BRANCH OF GOVERNMENT CAN FAVOR THE BELIEVER OVER THE NONBELIEVER.

This Court has always required government bodies, at all levels, to refrain from exhibiting any favoritism toward belief over nonbelief and from showing any favoritism toward believers over nonbelievers. One of the best expressions of this unbroken line of holdings by this Court is:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968).

The language in this quote from *Epperson* requires strict government neutrality in matters of religion. The concept of God and God's supposed Commandments to people is a religious notion. For government bodies to place replicas of the Ten Commandments on government seat-of-power property, as is the case here, is for government to favor belief over

nonbelief. The Ten Commandments can be divided up many ways. In their original form, at least as set forth in *Ex 20: 2-17*, there are sixteen Commandments, and a total of twenty five individual instructions. Of these, the first ten deal strictly with religious worship as God supposedly wants to be worshiped. Even when they are condensed down to ten for the popularized version that appears on public property in all cases and controversies that come before our courts, at least four of them are mandates for how God allegedly demands to be viewed and worshiped.

Government bodies do not preserve their required neutrality between religion and nonbelief when they display edicts that demand no other Gods before the Biblical God, the refraining from making graven images, not taking God's name in vain, and observance of the Sabbath.

Government bodies also violate their required neutrality between and among religions when they choose one version of the Ten Commandments over the other, that is, if they pick either *Ex 20: 2-17* or *Deut 5: 6-21*. Also, various religions group the total of twenty five instructions differently in order to come up with ten. Thus, even among Bible-based religions, the lack of agreement among various divisions of Christianity and Judaism makes it very difficult to reach a consensus about how the total of ten should be reached.

Again, government bodies are not just prohibited from favoring one religion over another, they are also prohibited from favoring religion, generally, over nonbelief, *Epperson*, supra.

As Justice Souter pointed out in his thorough concurring opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), the Framers of the Bill of Rights, including the Members of Congress in 1789, repeatedly considered and rejected language that would have allowed government to aid all religions, even if no preference or favoritism were shown to any one over any

other. Rather, the Framers of the First Amendment intended to prohibit government support or favoritism for religion in general. As Justice Souter points out, James Madison, the initial principal author of the First Amendment, had only a few years earlier collaborated with Thomas Jefferson in the composition of the Virginia Statute for Religious Freedom, in which all nonpreferential aid to religion, in general, was rejected, 505 U.S. at 615.

The version of the First Amendment that emerged from the House read that Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. 505 U.S. at 613. However, what finally emerged in September of 1789, after a joint conference between the House and Senate, was the actual language, now in force, that there shall be no law "respect ing an establishment of religion." 505 U.S. at 614. Justice Souter comments that it is remarkable that the final language rejected all earlier language that only prohibited laws establishing a national religion. *Id.* The final language prohibits all laws that even respect any establishment of religion.

This was in keeping with an entire constitutional scheme, starting with the drafting of the original Constitution in 1787, in which the nonbeliever was to suffer no legal disabilities or impediments because of rejecting any aspect of religious belief. Evidence of this is that the only reference to religion in the Constitution, prior to even the enactment of the Bill of Rights, was a negative one. *Article VI, Clause III* prohibits any religious test for public office. This was the first time in history that a sovereign nation had prohibited itself from imposing any minimum profession of faith, in any form, as a precondition to eligibility for public office.

Not only did James Madison, again the initial principal author of the First Amendment, collaborate with Thomas Jefferson in the drafting of the Virginia Statute for Religious Freedom, in 1785 he wrote his *Memorial and Remonstrance*

Against Religious Assessments, protesting a plan by the State of Virginia to assess a tax on the public for the support of all ministers. *James Madison on Religious Liberty*, Robert S. Alley, editor, Prometheus Books, Buffalo, New York, 1985, pages 55-60. This is further evidence that Madison approached the crafting of the First Amendment with the objective of preventing government from supporting all religions. Madison wanted government to support no religion whatsoever.

The debates to ratify the original Constitution took place after it was written in 1787 and before Madison's introduction of the First Amendment in 1789. The most crucial public commentary in urging ratification occurred in *The Federalist Papers*. In *Federalist No. 52*, Madison wrote approvingly that the door to holding office in the new national government will be open to "merit of every description . . . without regard to . . . any particular profession of religious faith." *The Federalist Papers*, The New American Library, New York, 1961, page 326.

Another crucial insight into Madison's thinking, in light of his being the initial principal author of the First Amendment, can be gleaned from his writings after leaving the presidency. In his *Detached Memoranda*, written in 1817, Madison expressed his disapproval of presidential proclamations of thanksgiving, and tax-supported chaplains for Congress and the armed services. "Madison's Detached Memoranda," ed. Elizabeth Fleet, *William and Mary Quarterly 3* (1946) 554-559.

Surely Madison, with guidance and input from Jefferson, wanted to establish a governmental system in which the official powers of the nation could not favor religion even generally. This point is even more powerfully bolstered by the above reference to Justice Souter's chronicling of how remarkable it was that the House and Senate ultimately went even beyond Madison's initial wording and wrote the final

First Amendment language with words that are even stronger in favor of government neutrality in matters of religion than was reflected in the version that first passed the House.

Thus, the cumulative effect of the strict separationist views of Jefferson, Madison, the No Religious Test Clause in the original Constitution, and the strengthening of Madison's initial language by the First Congress in 1789 all argue quite powerfully that the Founders intended to establish a constitutional system in which belief could not be favored over nonbelief.

A further example of how scrupulously the First Congress made sure that government did not in any way push or promote religious beliefs and that such beliefs should be entirely up to the individual, without even a hint of any government approval or disapproval of anyone's views on matters of religion, is apparent in the magnificent statement by a member of the House during Congress's consideration of the First Amendment. On August 15, 1789, Daniel Carroll said: ". . . the rights of conscience are, in their nature, of peculiar delicacy, and will little bear even the gentlest touch of governmental hand . . ." *Church and State in the United States*, Anson Phelps Stokes and Leo Pfeffer, Harper & Row, New York (1964), page 94.

Armed now with the concept that government cannot favor belief over nonbelief, it becomes quite clear that to say that the Ten Commandments are not an expression of religious beliefs is to violate all common understanding of the use of language. As has already been shown above, the first four Commandments are exclusively edicts of religious worship. Yet, in the instant case, the State of Texas did not delete these four from its display. Accordingly, the state has promoted the religious beliefs of no God before the Biblical God, the refraining from making graven images, not taking the Lord's name in vain, and keeping the Sabbath day holy. The State of Texas cannot constitutionally promote any of these concepts

by displaying them on government property. As this Court has repeatedly said:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to "profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers.

Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

The language from *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-310, quoted in the above SUMMARY OF ARGUMENT, that no branch of government may ever communicate to anyone that because of either accepting or rejecting any religious belief, they are outsiders and not full members of the political community, is thoroughly contravened if any branch of government can display the Ten Commandments as a foundation of its governing laws. This automatically transforms nonbelievers and members of religious minorities into outsiders, and communicates to them that their government deems its legal underpinning to be grounded in the edicts of the Biblical God.

II. SINCE NO BRANCH OF GOVERNMENT CAN FAVOR BELIEF OVER NONBELIEF, NO BRANCH OF GOVERNMENT CAN CONVEY THE IMPRESSION THAT THE TEN COMMANDMENTS ARE A GUIDING LIGHT FOR THE GOVERNING LEGAL SYSTEM.

The above section has demonstrated that no branch of government can favor the believer over the nonbeliever and that no branch of government can communicate to nonbelievers or religious minorities that they are less a part of the political community than believers. To the extent that acknowledging any religious heritage means that government, even by implication, sides with those who believe in God, against those who don't, that branch of government has

violated the First Amendment. This Court has repeatedly held that no branch of government can "aid one religion, aid all religions, or prefer one religion to another." *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15 (1947).

In the Circuit Court opinion below, which *Amicus* urges this Court to reverse, the majority opinion stated that the Ten Commandments display, located between the State Capitol and the Texas Supreme Court, is to be interpreted by a reasonable viewer "as a recognition of the large role of the Decalogue in the development of Texas law." *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003). It is constitutionally impermissible for the State of Texas to declare that not putting any Gods before the Biblical God, not making graven images, not taking the Lord's name in vain, and observance of the Sabbath are all major pillars of that state's legal system. Government actions that favor religious believers over nonbelievers are unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring.)

The 5th Circuit went on to state that the Ten Commandments have a secular dimension as well as a religious meaning. *Van Orden*, 351 F.3d at 179. This is precisely the problem. There is a religious meaning which renders the display unconstitutional. The State of Texas would have a better chance of passing constitutional muster if it deleted all the Commandments that give orders for religious observance and that delineate the proper way to interact with God. Even if there is a secular dimension to admonitions against killing and stealing, this does not allow any branch of government to showcase the notion of having no Gods before the Biblical God as being an integral part of the development of the governing legal system.

III. THIS UNITED STATES SUPREME COURT HAS ALREADY SPOKEN DEFINITIVELY ON THE RELIGIOUS NATURE OF THE TEN COMMANDMENTS AND HOW, AS A TOTALITY, THE SECULAR DIMENSION CANNOT BE EXCISED FROM THE DECALOGUE'S RELIGIOUS CHARACTER.

This Court has unambiguously said:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of supposed secular purpose can blind us to that fact.

Stone v. Graham, 449 U.S. 39, 41 (1980).

This contradicts the position of the 5th Circuit in the opinion below. This Supreme Court recognized that the religious character of the totality of the Commandments is indelible and that, taken as a whole, the secular cannot be severed from the sacred. This very Court then went on to even more powerfully make the point:

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God, alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20: 1-11; Deuteronomy 5: 6-15.

Stone, 449 U.S. at 41-42.

Accordingly, unless the State of Texas deletes those elements of the Commandments that concern the religious duties of believers, the display on government property, at the very seat of state government, is the promotion of the religious points of view contained within the Commandments-taken as a whole-and is thus unconstitutional.

IV. THIS UNITED STATES SUPREME COURT HAS RECENTLY LET STAND THREE CIRCUIT COURT OF APPEALS CASES, IN WHICH THE RESPECTIVE CIRCUITS, 6TH, 7TH, AND 11TH, HAVE HELD UNCONSTITUTIONAL DISPLAYS OF THE TEN COMMANDMENTS ON GOVERNMENT SEAT-OF-POWER PROPERTY, UNDER CIRCUMSTANCES VIRTUALLY IDENTICAL TO THE INSTANT CASE.

In *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied,* 534 U.S. 1162 (2002), a display of the Ten Commandments on the grounds of the Indiana Statehouse was held to be a violation of the Establishment Clause. In *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied,* 123 S.Ct. 1009, 155 L.Ed. 2d 826 (2003), a display of the Ten Commandments on the grounds of the Kentucky State Capitol was held to be a violation of the Establishment Clause. In *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 497, 157 L.Ed. 2d 404 (2003), a display of the Ten Commandments in the Alabama State Judicial Building was held to be a violation of the Establishment Clause. This Supreme Court refused to review or alter in any way each of these three Circuit Court of Appeals decisions. The one characteristic that each of these three cases have in common with each other, and have in common with the instant case, is that they all involve displays of the Ten Commandments on public property that is also a state government seat of executive, legislative, or judicial power.

When a state government chooses to display the Ten Commandments, consisting of such religious mandates as exclusive worship of the Biblical God and observance of the Sabbath as holy, on property that contains the highest offices of that state's government, the state conveys a constitutionally impermissible impression of endorsing the substance,

including the purely religious edicts, of the Commandments. Conveying such an impression of endorsement is prohibited by the precedents of this Court. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 597-598 *footnote 47* (1989).

V. WHEN VIEWED IN ITS TOTALITY, THE EMPLACEMENT OF THE TEN COMMANDMENTS AT A POINT ON A DIRECT LINE BETWEEN THE LEGISLATURE, GOVERNOR'S OFFICE, AND TEXAS SUPREME COURT, CONSTITUTES AN IMPERMISSIBLE IMPRESSION THAT THE STATE OF TEXAS ENDORSES ALL OF THE TEN COMMANDMENTS AS A RELEVANT CODE THAT UNDERGIRDS THE STATE'S LEGAL SYSTEM.

There is no dispute that the Ten Commandments display at issue here is on a direct line, on state seat-of-government grounds, between the buildings that house the legislative, executive, and judicial branches of the government of the State of Texas, *Van Orden*, 351 F.3d at 181. Texas argues that this is no more significant than if the Decalogue were placed in a museum setting. 351 F.3d at 180. However, the state then immediately contradicts itself when the executive director of the Texas State Preservation Board, in uncontroverted testimony at trial, explained that the location was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law. 351 F.3d at 181. This obviously contradicts the attempt to portray the display as being as devoid of state endorsed religious content as if it were deposited in some museum.

Also, the state's reliance on its claim that the Decalogue played an important historical role in the development of the state's legal system does not survive Establishment Clause scrutiny, because the requirement of government neutrality in matters of religion does not permit any branch of government to declare that its legal system is bound up with religious

decrees. Government bodies cannot get around this by claiming that the intertwinement of their legal system and such religious edicts are a matter of history. This Court has specifically held that a historical nexus between government and religious doctrines cannot legitimize government support, promotion, or endorsement of any such religious doctrine. *Allegheny County*, 492 U.S. at 603.

In *Adland*, *supra.*, 307 F.3d 471, the 6th Circuit struck down a Ten Commandments display on Kentucky state capitol grounds, as violating the Establishment Clause under circumstances remarkably similar to the situation in the instant case. In *Adland*, 307 F.3d at 475, the Ten Commandments was a gift to the state by the Fraternal Order of Eagles, the same as in the instant case, *Van Orden*, 351 F.3d at 176. Both monuments are the same size, six feet high and a little under four feet wide. *Adland*, 307 F.3d at 475; *Van Orden*, 351 F.3d at 176. Both have an American eagle grasping the American flag. Both have two small tablets containing ancient Hebrew script. Both have two small stars of David. Both have symbols representing Jesus Christ in the form of two Greek letters, Chi and Rho, superimposed on each other. *Adland*, 307 F.3d at 476; *Van Orden*, 351 F.3d at 176.

The 6th Circuit in *Adland* correctly found that the display of the Ten Commandments on grounds that are "the seat of government is so plainly under government ownership and control that every display on its property is marked implicitly with government approval." 307 F.3d at 486. Since the display at issue here is on a direct line between the legislative, executive, and judicial offices of Texas state government, *Van Orden*, 351 F.3d at 181, the 5th Circuit erred in its decision to allow the continued presence of this monument.

As shown above, in both virtually identical monuments, in *Adland* and in the instant case, there is an American eagle gripping the American flag at the top of the Ten Commandments display. The 5th Circuit, below, ignored this. However, the 6th Circuit correctly determined that this aspect of the monument "serves to heighten the appearance of government endorsement of religion. *Adland*, 307 F.3d at 487.

Even though both monuments were situated in a physical location in which other displays are close by, each Ten Commandments display stands out on the state-seat-of-government grounds of respectively, Kentucky and Texas. What the 6th Circuit said in *Adland* is what the 5th Circuit, below, should have said:

> In this case, the religious symbol, the Ten Commandments, is the predominant element in the display. Accordingly, a reasonable observer is likely to believe that the religious message of the Ten Commandments is the dominant message of the display.

Adland, 307 F.3d at 487.

In the instant case, there is nothing to show that the disparate monuments and displays on Texas-seat-of-government grounds are in any way part of an overall scheme or display. Each such display, as in *Adland*, seems to be free standing. The 5th Circuit made the wrong decision. The 6th Circuit made the right decision in holding:

> Without a unifying theme to hold the display together, a reasonable observer could only view the monuments separately. If a reasonable observer views the monuments separately, unconnected by a common context, his or her attention is naturally drawn to the Ten Commandments monument, the largest monument in the display, and its accompanying religious message.

Adland, 307 F.3d at 488.

Another area of crucial similarity between *Adland* and the instant case is that in both, the Ten Commandments monuments in question were moved to positions of more central prominence on the respective state seat-of-government

grounds after each had been situated for at least thirty years in a location other than the one to which it was to be moved, when each respective lawsuit was brought. In *Adland*, the Decalogue was to be relocated near Kentucky's floral clock in order to remind residents of the state of the Biblical foundations of their laws. 307 F. 3d at 475. In the instant case, the Decalogue was first situated in 1961, *Van Orden*, 351 F.3d at 176, and then moved to its present location on capitol grounds in 1993—at the point on the direct line between the Legislature, Governor's office, and Texas Supreme Court—in order to reflect the role of the Ten Commandments in the making of the state's governing laws. 351 F.3d at 181. Since the *Adland* Court found such a positioning to be unconstitutional, so should have the *Van Orden* Court below. Since this Supreme Court denied *certiorari* and thereby refused to disturb the holding in *Adland*, this Supreme Court is now respectfully requested to reverse the 5th Circuit in the instant case, so that, at the very least, the constitutionally correct decision in *Adland*, which this Supreme Court refused to modify in any way, will now clearly prevail.

In *Indiana Civil Liberties Union*, *supra.*, 259 F.3d 766, the 7th Circuit struck down a Ten Commandments display on Indiana state capitol grounds as violating the Establishment Clause, under circumstances again remarkably similar to the circumstances in the instant case. In a lawsuit to stop the emplacement of a Ten Commandments monument on state capitol grounds in Indianapolis, the 7th Circuit held that because the state "had not shown a historical link between most of the Ten Commandments and the ideals of government and the legal system," the monument was a religious display. 259 F.3d at 770. The 7th Circuit was correct in declaring this to be a constitutional defect. Yet, the 5th Circuit erroneously did not recognize an identical First Amendment violation in the Texas monument's serving "as a

recognition of the large role of the Decalogue in the development of Texas law." *Van Orden*, 351 F.3d at 177.

The 7th Circuit recognized that if the totality of the Ten Commandments are displayed, including the mandates to worship only the Biblical God, to avoid idolatry, to not take the Lord's name in vain, and to observe the Sabbath, the Decalogue is definitely then "a religious and sacred text that transcends secular ethical and moral concerns." *Indiana Civil Liberties Union*, 259 F.3d at 770. The 7th Circuit went on to recognize that duty-to-God Commandments "are wholly religious in nature, and serve no secular function." 259 F.3d at 770-771. The 7th Circuit also held that even the display of secular texts along with the Decalogue does not automatically lead to a finding that the purpose in erecting the monument is primarily secular. *Indiana Civil Liberties Union*, 259 F.3d at 771.

The 7th Circuit recognized that the Ten Commandments are still an inherently religious text and are a code that focuses on subjects "that are beyond the ken of any government and that address directly the relationship of the individual human being to God." 259 F.3d at 771. In *Indiana Civil Liberties Union*, the 7th Circuit recognized that displays of the Ten Commandments in the form of monuments such as the one at issue in the instant case, unconstitutionally sends a message "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices." 259 F.3d at 772.

In the instant case, the State of Texas makes the argument that the Ten Commandments monument at issue here is displayed in a museum setting so as to substantially dilute any active message of government endorsement of any religious message. *Van Orden*, 351 F.3d at 180. In *Indiana Civil Liberties Union*, the State of Indiana attempted to make the identical argument that the museum-like setting of the display

neutralized any claim that the state was endorsing a religious message. 259 F.3d at 772. However, the 7th Circuit correctly responded to this in a manner directly transferrable to the present case now before this Supreme Court:

> But this is not simply some museum nestled in some secluded park. The grounds which house, among other things, the Capitol, the Governor's office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals, is the seat of Indiana government. We subject to particularly careful scrutiny displays at the seat of government.

Id.

This is identical with the emplacement of the Ten Commandments monument in the instant case on the direct line between the Texas Legislature, Governor's Office, and Texas Supreme Court. *Van Orden*, 352 F.3d at 181. The identical reasoning by the 7th Circuit, quoted above, to strike down the claim of the State of Indiana, that it's proposed Ten Commandments monument display at the seat of government is rendered constitutionally innocuous because of some museum-like setting, is applicable in full force to defeating the exact same claim made here by the State of Texas.

In *Glassroth,* supra., 335 F.3d 1282, the 11th Circuit upheld the Federal District Court's order that the Chief Justice of Alabama remove a Ten Commandments monument from the Alabama State Judicial Building. The 11th Circuit correctly noted that the location of the monument gave an onlooker "the sense of being in the presence of something not just valued and revered (such as an historical document) but also holy and sacred." 335 F.3d at 1286. This is also applicable to the location of the Texas monument, at issue here, which is intentionally situated in order to be integral to the physical line between the buildings that house the three main branches of Texas state government. *Van Orden*, 351 F.3d at 181.

The 11th Circuit concluded that a reasonable observer would find nothing on the monument in the Alabama State Judicial Building to de-emphasize its religious nature. 335 F.3d at 1297. There is likewise nothing on the Texas monument, at issue here, that would de-emphasize its religious nature.

Again, this Supreme Court's denial of *certiorari* and concomitant refusal to disturb or alter, in any way, the decisions of the 6th, 7th, and 11th Circuit Courts of Appeals in cases virtually identical to the instant case, powerfully argues for the reversal of the 5th Circuit here in *Van Orden*. Such a reversal would then eliminate the conflict between the 6th, 7th, and 11th Circuits on the one hand, and the 5th Circuit on the other. Reversing the 5th Circuit in the instant case is also mandated by this Supreme Court's Establishment Clause precedents.

VI. THE TEN COMMANDMENTS DISPLAY AT THE TEXAS SEAT OF GOVERNMENT DOES NOT HAVE A SECULAR PURPOSE. IT HAS THE EFFECT OF ADVANCING RELIGION. IT ALSO FOSTERS AN EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

The 5th Circuit, below, was right in holding that the tripartite inquiry of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is still "a required staring point in deciding contentions that state displays of symbols and writings with a religious message are contrary to the First Amendment." *Van Orden*, 351 F.3d at 177. The 6th Circuit was correct in deeming the *Lemon* tests to still apply until this Supreme Court "explicitly overrules or abandons it." *Adland*. 307 F.3d at 479. *Lemon* was correctly applied by the 7th Circuit in *Indiana Civil Liberties Union* 259 F.3d at 770. It was also applied correctly by the 11th Circuit in *Glassroth*, 335 F.3d at 1295. Thus, the 6th, 7th, and 11th Circuits all correctly applied *Lemon* to strike down Ten Commandment monuments on state seat-of-

government property. The 5th Circuit correctly joined the other three Circuits in recognizing the continued relevance of the *Lemon* analysis, but was wrong and alone, among the four Circuits, in finding that none of the *Lemon* tests were violated.

In order to be constitutional, government action must have a secular purpose. As already demonstrated in this *Amicus Brief*, the inclusion of the religious edicts of the Ten Commandments does not allow for the separating of the secular from the religious message of the Commandments. Thus, the display violates the 1) requirement that all government action have a secular purpose. *Lemon,* 403 U.S. at 612. The display and the positioning of the display in its strategic location in a direct line between the Legislature, the Executive Offices of the Governor, and the Texas Supreme Court, *Van Orden,* 351 F.3d at 181, has the primary effect of advancing religion, since it is a religious display containing the Commandments pertaining to how one is to worship God and keep the Sabbath. Texas therefore violates the 2) requirement that no government action have the principal or primary effect of advancing religion. *Lemon,* 403 U.S. at 612.

Because of the religious message of the Ten Commandments display and its physical location central to the main branches of state government, at the seat of state government, it constitutes the State of Texas' 3) excessive entanglement with religion, which is constitutionally impermissible. *Lemon* 403 U.S. at 613.

All three of the *Lemon* tests are therefore violated by the Ten Commandments monument on display on state seat-of-government grounds in Austin, Texas.

VII. IF THIS COURT UPHOLDS THE TEN COMMANDMENTS DISPLAY BY THE STATE OF TEXAS AT THE SEAT OF POWER OF STATE GOVERNMENT, THE COURT WILL THEN HAVE TO DEFINE THE EXACT PARAMETERS OF THE EXTENT TO WHICH GOVERNMENT CAN FAVOR BELIEVERS OVER NONBELIEVERS.

Throughout this Brief, *Amicus* has clearly shown that this Supreme Court, by its own words, insists on a society in which the believer and nonbeliever are equal before the law and before all branches of government. If this Court now upholds the Ten Commandments display by the State of Texas, at issue here, the Court will then have to hand down precise guidelines for our nation, delineating where government can favor belief over nonbelief and where government cannot do so. This would be a painstaking task that requires the most minute analysis of every facet of all government actions that touch upon God or religion. It would be much more consistent with this Court's unbroken line of precedents to reverse the 5th Circuit and to declare as unconstitutional the display of the totality of the Ten Commandments—including all the instructions for showing the proper reverence for God and the Sabbath—by any branch of government, particularly at its seat of power, in a manner such as is the situation in Texas.

If branches of government can celebrate and promote Commandments that deal with exclusive worship of the Biblical God, in what other ways will this Court now allow government to favor belief over nonbelief and Biblical religion over non Biblical religion?

In what way, then, will branches of government be permitted to favor the believer over the nonbeliever? If any government body can show even the slightest preference for belief over nonbelief, this would violate everything the First

Amendment stands for. No branch of government can show any favoritism towards anyone, based upon that person's views on matters of religion. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. at 15-16.

This Court has:

> unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects or even intolerance among "religions" to encompass intolerance of the disbeliever and the uncertain.

Wallace v. Jaffree, 472 U.S. 38, 53-54 (1985).

If branches of government can give prominence to displays of religious edicts, as "a recognition of the large role" of such edicts in the development of the prevailing legal system, *Van Orden*, 351 F.3d at 177, then government bodies can turn nonbelievers and religious dissenters into outsiders, which action—on the part of any facet of government—this Court has correctly held to be unconstitutional. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-310.

If this Court were to allow government authorities to dodge adhering to the requirement of government neutrality in matters of religion, mandated by the First Amendment, the counter majoritarian purpose of the Bill of Rights would be undermined. This Court has famously held:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of political

> majorities . . . One's right to...free speech . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

The First Amendment has a deep purpose of requiring government neutrality in all matters of religion, so as to not only preserve equal rights for both believers and nonbelievers but also to prevent the kind of internal strife that historically occurred within countries whenever the government was permitted to promote religion. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert of dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

School District of Abington Tp. v. Schempp, 374 U.S. 203, 222 (1963).

On what underlying, cohesive theory could a consistent constitutional doctrine be developed that would allow the government to openly promote the idea that our legal system is significantly undergirded by a set of edicts that prescribe the exclusivity of worshiping the Biblical God and how that God is to be shown respect, along with keeping the Sabbath day holy? How could such a practice not violate the clear Constitutional mandate that no branch of government can demonstrate favoritism for belief over nonbelief? There is no sound manner in which such a constitutional doctrine could be composed. This Court has clearly held that government cannot "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Texas Monthly v. Bullock*, 489 U.S. 1, 9 (1989).

As shown in Section I. of this Brief, James Madison, the initial principal author of the First Amendment, was heavily influenced by Thomas Jefferson in the quest to achieve a governmental system in which there would be no favoritism in favor of belief over nonbelief. Though Jefferson was in Paris at the time of the introduction into Congress of the First Amendment, he continued to influence Madison by way of correspondence. In 1787, one year after Jefferson and Madison successfully achieved passage in the Virginia Legislature of their Virginia Statue for Religious Freedom, Jefferson published his *Notes on Virginia*. The portion relevant here was written by him between 1782 and 1786. In *Query XVII* of the *Notes*, Jefferson wrote:

> The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are 20 gods, or no god. It neither picks my pocket nor breaks my leg.

The Works of Thomas Jefferson, Paul L. Ford, editor (Federal Edition), Volume IV, G.P. Putnam & Sons, London and New York, 1904-05, *Query XVII* found at: http://xroads.virginia.edu/~HYPER/JEFFERSON/toc.html

The scheme of the Framers was to create a governmental system in which not even the slightest government favoritism can be manifested in favor of religious belief over nonbelief. Once the Fourteenth Amendment made the Bill of Rights binding on the states, the Framers intentions now apply to every branch of government in the nation. No state should be permitted to hold up a religious document and suggest in any way that such a religious text is a founding pillar of that state's legal system.

No branch of government can "treat people differently based on the God or gods they worship or do not worship." *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J. concurring.) Accordingly, no branch of

government should ever be permitted to declare that a series of religious edicts that prescribe the exclusivity of worship owing to the Biblical God are foundational components of the governing legal system. If any government body were to do so, the nonbeliever and religious dissenter would then be treated differently and their government would unconstitutionally communicate to them that they are outsiders and not a part of the official theological matrix that spawned the law of the land.

Rather than trying to cobble together such an internally inconsistent theory, the highest fidelity to the Constitution would be maintained by reversing the 5th Circuit and thereby reinforcing the proper constitutional principle that no branch of government can show any favoritism for the believer over the nonbeliever. This entails compelling all branches of government to refrain from officially displaying the totality of the Ten Commandments, including its instructions for worshiping the Biblical God, to the exclusion of any other deity, along with keeping the Sabbath day holy. The Ten Commandments display, at issue here, violates the Establishment Clause because it allows the State of Texas to give the impression that the state views its very legal system as grounded upon religious decrees.

CONCLUSION

Counsel of record; David Koepsell, J.D., PhD.; and David Musella, who helped edit this Brief; all wish to express our profound appreciation to this Supreme Court for considering the views of this *Amicus*.

Based on the foregoing, it is respectfully requested that this Court reverse the decision of the 5th Circuit Court of Appeals.

Respectfully submitted.

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December 10, 2004

No. 03-1500

IN THE
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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No. 03-1500

IN THE
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized

[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right to publicly display the Ten Commandments.

SUMMARY OF ARGUMENT

The lower court properly applied the *Lemon* test, and its ruling should be affirmed. The court recognized that the test under *Lemon* is an objective one, focusing on whether a "reasonable observer" would understand the display to constitute an "endorsement" of a particular religion. Because the Ten Commandments have a well-established secular as well as religious meaning, the court correctly held that an objective observer would not perceive their display as an "endorsement" of religion.

The Fifth Circuit's analysis therefore stands in stark contrast to that in *McCreary*, where the court barred a similar Ten Commandments display after applying a highly subjective analysis of the intentions of the government actors responsible for the display. The disparate rulings by the courts in *Van Orden* and *McCreary* provide a powerful illustration of the problems inherent in the *Lemon* test.

The *Lemon* test has caused confusion among the lower courts and often restricts religious liberty in a manner that is inconsistent with the original meaning of the First Amendment. The Establishment Clause was originally viewed as a federalism provision that protected state establishments from interference by the federal government. The Framers wisely recognized that the individual states should remain free to adopt diverse practices with respect to

religion without the threat of an established church at the national level.

The *Lemon* test is inconsistent with this original understanding. It interjects the federal government into state decisionmaking in a manner that restricts religious liberty. Accordingly, *Amicus* respectfully requests that the Court abandon the *Lemon* test in favor of an analysis that is more consistent with the original meaning of the First Amendment—one that makes clear that the display of the Ten Commandments does not constitute an "establishment" of religion.

BACKGROUND

Petitioner asks the federal courts to order the removal of a display of the Ten Commandments that all parties agree has been an element of a legally-protected National Historic Landmark for over forty years. *See Van Orden v. Perry*, 351 F.3d 173, 175 n.1 (5th Cir. 2003). The display is one of a "wide array" of monuments, plaques and seals on the grounds of the Texas State Capitol "depicting both the secular and religious history of Texas." *Id.* at 175-76. The Ten Commandments monument was a gift of a private organization, the Fraternal Order of Eagles, and contains an inscription to that effect. *Id.* at 176.

Petitioner maintains that the display violates the Establishment Clause under the test set forth in *Lemon v. Kurtzman*. While Petitioner concedes that the monument does not involve an "excessive entanglement" of government and religion, he maintains that it lacks a secular purpose and that its primary effect is to advance religion. *Id.* at 177. Both the district court and the Fifth Circuit rejected this contention, concluding that a reasonable observer would not perceive the display as an endorsement of religion. *See id.* at 182.

ARGUMENT

I. The *Lemon* test is inconsistent with the original meaning of the Establishment Clause and has resulted in confusion.

The Fifth Circuit correctly applied the *Lemon* test. Its ruling should be affirmed. In many instances, however, the *Lemon* test has caused confusion among the lower courts, resulting in the prohibition of religious expression that the Framers never thought constituted an "establishment" of religion.[2] This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence and bring it more closely in line with the original meaning of the First Amendment.

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[2] *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2327 (2004) (Thomas, J., concurring in judgment) (noting the "difficulties with our Establishment Clause cases"); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in judgment) (noting "the long list of constitutional scholars who have criticized *Lemon*"); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (*Lemon* "has received well-earned criticism from many Members of this Court"); *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (refusing to "adopt[] [the *Lemon*] test as our primary guide in [holiday display cases]"); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment) (noting the "difficulties inherent in the Court's use of the test articulated in *Lemon*"); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in the judgment) ("Despite its initial promise, the *Lemon* test has proved problematic."); *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (noting the "sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

A. The *Lemon* test has caused confusion among the lower courts.

Under the three-part test articulated by the Court in *Lemon*, governmental action is constitutional only if it has a "secular" purpose, its "principal or primary effect" is one that "neither advances nor inhibits religion," and it does not "foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). In certain contexts, the entanglement prong may be considered as an aspect of the effects inquiry. *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). Governmental actions that run afoul of any of these three prongs may be barred as unconstitutional under this test. The test has proven particularly problematic given that each element is highly malleable and is subject to a multitude of inconsistent and confusing constructions.

In determining whether government action has a "secular purpose," for example, courts have relied on the subjective intentions of the authors of government action to a greater or lesser extent. Insofar as these subjective intentions guide the constitutional analysis, the potential for disparate outcomes increases as different judicial entities are called upon to review similar government actions. *See Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (observing that the secular purpose prong "has proven mercurial in application").

Similarly, courts take different approaches in determining whether government action "advances" or "inhibits" religion. Often courts do not take sufficient account of the inhibitory nature of governmental conduct on religion or are overly deferential to government actors when the question is whether they are inhibiting religious practices. As a result, courts have upheld governmental actions that are openly hostile to religion or religious belief. *See, e.g., American Family Ass'n, Inc. v. City and County of*

San Francisco, 277 F.3d 1114, 1119, 1122 (9th Cir. 2002) (upholding resolution denouncing the "Religious Right" and various religious organizations for their position on the morality of homosexuality after concluding that there was "little guidance concerning what constitutes a primary effect of inhibiting religion").

Finally, there are disparate approaches to what constitutes "excessive" entanglement given that "[e]ntanglement is a question of kind and degree." *See Lynch v. Donnelly*, 465 U.S. 668, 684 (1984). Some courts take a deferential view, while others take a more rigid approach. Lacking sufficient guidance, the lower courts are left to "puzzle through this analysis" on their own. *See Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 497 (5th Cir. 2001) (en banc) (Wiener, J., concurring in part and dissenting in part) ("[T]o date the Supreme Court has offered scant guidance as to what quality and quantity of entanglement is excessive.").

The fact that this Court has refused to apply a "single test or criterion" in analyzing purported Establishment Clause violations has only added to the confusion. *See Lynch*, 465 U.S. at 679. Not only are courts unsure how to apply the factors identified in *Lemon*, but they are unsure whether and to what extent those factors apply in individual cases. Moreover, even in cases where the *Lemon* factors apply, the test "has caused this Court to fracture into unworkable plurality opinions, . . . depending upon how each of the three factors applies to a certain state action." *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting). The result has been a string of decisions that are difficult to reconcile.

In sum, the *Lemon* test does not provide the well-defined rules that are required to give the lower courts and government actors clear guidance as to what is constitutionally permissible state action. As such, it only encourages wasteful and expensive litigation.

B. The lower courts invoking *Lemon* have prohibited religious expression that the Framers never thought constituted an "establishment" of religion.

More significantly, as a result of confusion among the lower courts applying *Lemon*, there have been instances in which state action that was never thought to constitute an "establishment" of religion has been prohibited. Thus, for example, courts have barred a reference to God in the pledge of allegiance, *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2301 (2004), prayers opening town council meetings that mention Jesus Christ, *Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292 (4th Cir. 2004), and the display of a cross on public land as part of a privately-erected war memorial, *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

As a result, the *Lemon* test often has interfered with religious expression. This Court has emphasized that "the common purpose of the Religion Clauses 'is to secure religious liberty.'" *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). It has recognized that religious speech is protected to an equal extent whether on government or private property. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Nonetheless, the test the Court outlined in *Lemon* has often resulted in an overt hostility to religious expression, thereby bringing the courts "into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Lynch*, 564 U.S. at 673 (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948)). *See also Edwards v. Aguillard*, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) ("We have not yet come close to reconciling *Lemon* and our Free Exercise cases, and typically we do not really try.").

Moreover, the chilling effect of potential litigation on public religious expression has been significant.[3] Because the *Lemon* test does not provide clear guidance, state actors are often inclined to prohibit religious expression rather than face the possibility of costly and protracted litigation. Thus, not only is the *Lemon* test overly restrictive of religious expression on its face, but in its application it often has practical effects that the Court never intended.

C. The *Lemon* test is based on a flawed historical metaphor.

At bottom, the problems with the *Lemon* test are directly traceable to its lack of historical support. The test is premised on the notion that the First Amendment creates a "wall of separation" between church and state. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). These terms, however, are nowhere found in the constitutional text. Moreover, this concept of church-state relations is at odds with the historical record. "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in

[3] *See, e.g., Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Professor Vincent Phillip Munoz) *at* http://judiciary.senate.gov/testimony.cfm?id=1218&wit_id=3523 ("The law's vagueness makes state acknowledgement of religious sentiment suspect. It enables special interest litigators, who are professionally hostile toward religion, to file lawsuits to challenge almost any state action that accommodates religion. The chilling effect of such litigation and the mere threat [of] it is considerable. . . . Fearful local officials and public school administrators have the incentive to eliminate the public acknowledgement of religious sentiment in order to avoid costly litigation."); *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 49, 51-52 (1996) (testimony of William A. Donohue, Catholic League for Religious and Civil Rights) (maintaining that the potential for lawsuits has "create[d] a chilling effect on the free speech rights of the Catholic clergy" and that confusion about the status of the law has created "religious-free zones").

Everson.'" *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).[4] Rather, they contemplated that there would be a healthy interaction between religion and government.[5]

Indeed, this Court has acknowledged that "[t]he metaphor of a 'wall' or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis," *Gillette v. United States*, 401 U.S. 437, 450 (1971), and that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state," *Lynch*, 465 U.S. at 673. Even in *Lemon*, the Court observed that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." 403 U.S. at 614. The experience under *Lemon*—a history that is marked by controversy and confusion—has demonstrated that the test is inherently flawed.

[4] *See also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002) ("As should be clear from the contrast between separation and the religious liberty guaranteed b, the First Amendment, the constitutional authority for separation is without historical foundation."); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 485 (1991) ("With little or no support from text, history, or tradition, the members of the *Everson* Court braided into the Religion Clause the notions that the establishment provision was meant to create a 'wall of separation' between religion and the government, that it was to be broadly construed to prohibit all government aid to religion, and that government was required to be strictly neutral as between religion and nonreligion.").

[5] *See, e.g.*, MASS. CONST. OF 1780, art. III (observing that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality" and that "these cannot be generally diffused through a Community, but by the institution of the publick worship of GOD, and of publick instructions in piety, religion, and morality").

II. The Establishment Clause was originally understood as a federalism provision.

The difficulties associated with the *Lemon* test may largely be avoided by returning to an interpretation of the Establishment Clause that is more consistent with its original meaning. "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring in judgment).[6] As such, the clause merely reiterates the fundamental division of power embodied in the original Constitution. The federal government was not delegated the authority to establish a national church. Nor was it given the authority to interfere with the state establishments.

A. The Establishment Clause prohibits federal interference with state establishment of religion.

The Establishment Clause provides that Congress shall pass no law "respecting an establishment of religion." U.S. CONST. amend. I. The term "respecting" was understood as being synonymous with the term "relating." *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773). To "establish" meant "[t]o settle in any

[6] *See also Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) (Establishment Clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations"); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting) (Establishment Clause "was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments").

privilege or possession; to confirm." *Id.* A "privilege", in turn, was understood as a "[p]eculiar advantage," an "[i]mmunity", or a "publick right." *Id.*

Thus, the text suggests that the Establishment Clause was designed to prohibit Congress from passing any law that would uniquely privilege a single religion by establishing it at the national level. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Such uniformity would interfere with the religious liberty found in the several states, which took diverse approaches to religious worship and establishment of particular churches. The text, however, "does not purport to protect individual rights." *Id.* Rather, it is a structural provision that prohibits the federal government from undertaking certain prohibited actions. As such, it is not subject to incorporation against the states pursuant to Section One of the Fourteenth Amendment. Indeed, incorporation of the Establishment Clause would "lead[] to a peculiar outcome"—i.e., "[i]t would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion." *Id.* at 2331 (emphasis added).[7]

The history of the clause further confirms this construction. When the amendment was proposed and

[7] *See also Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (incorporation of the clause would lead to the "irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy"); AMAR, *supra*, at 41 ("As a more pure federalism provision, then, the establishment clause seems considerably more difficult to incorporate against states."); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 95 (1987) (incorporation of the Establishment Clause is "logically impossible; it would be like trying to apply the Tenth Amendment to the states"); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 253 n.19 (1988) ("[T]o the extent that the framers of the first amendment sought to protect state establishments against national action, it is not entirely coherent to say that the amendment is now applicable to the states.").

ratified, several of the states maintained established churches. *Id.*; AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-33 (1998). Nonetheless, the approaches to public measures regarding religion varied widely from state to state. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 11 (1994).[8] While some states had exclusive establishments, authorizing only a single established church, a few states provided for multiple established religions. *See, e.g.*, S.C. CONST. OF 1778, art. XXXVIII (providing a mechanism by which religious societies could become "established" and "enjoy equal Privileges"); VT. CONST. OF 1777, art. XLI ("all religious societies" shall be "encouraged and protected"). Other states, in contrast, prohibited the establishment of any church in preference to another. *See, e.g.*, N.J. CONST. OF 1776, art. XIX ("[T]here shall be no Establishment of any one Religious Church or denomination in this State in Preference to any other.").

From the outset, the Founders recognized that the federal government lacked authority to interfere with these state establishments, and in particular lacked the authority to establish a national church. The federal government was to be a government of limited and enumerated powers. The Framers emphasized that "[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined." THE FEDERALIST NO. 45, at 292 (Clinton Rossiter ed. 1961) (James Madison).

This general principle extended to matters of religion. James Madison observed in the Virginia ratification debates that "[t]here is not a shadow of right in the general

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[8] *See also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 381 (2002) ("Modes of establishments in the colonies differed very widely, and the word 'establishment' was not used consistently.").

government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." 5 THE FOUNDERS' CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987). James Iredell similarly stated in defending the proposed Constitution that "[i]f any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Everyone would ask, 'Who authorized the government to pass such an act?'" 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 194 (Jonathan Elliot ed., 2d ed. 1881). Thus, even before the Establishment Clause was embodied in the text of the Constitution, there was a general recognition that the federal government lacked the power to interfere with the states' regulation of religion.

Despite these structural guarantees, there remained some concern that the federal government might usurp authority to act with respect to the establishment of religion. As James Madison observed in describing the proposed amendment, certain of the state conventions "seemed to entertain an opinion" that the Necessary and Proper Clause might enable Congress to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion." 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789). In order to reinforce this jurisdictional division between the states and the federal government and better secure religious liberty, when crafting the Bill of Rights the Framers sought to make this division of power express.

Congress went through several drafts in creating what ultimately became the Establishment Clause. James Madison initially proposed the following language: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 451. The House Committee of the Whole subsequently debated language that provided that "no religion shall be established

by law, nor shall the equal rights of conscience be infringed." *Id.* at 757. Madison indicated that this provision meant that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 758. According to Madison, "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* At the same time, however, some "thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments." *Id.* at 757 (remarks of Roger Sherman).

Thus, the debates demonstrate that Congress believed that the federal government lacked authority to establish a national church or interfere with the state establishments. *See Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring in judgment). Nonetheless, in order to dispel any concerns, Congress sought to make this division of power express.

In doing so, the Framers made clear that the federal government would take no action that would restrict religious practices in any way. Accordingly, the Establishment Clause was coupled with a further admonition—that Congress was prohibited from passing any law that would impermissibly burden the "free exercise" of religion. U.S. CONST. amend. I. The First Amendment therefore guaranteed religious liberty more broadly—beyond merely prohibiting the establishment of a national church that might interfere with established churches in the several states.

Early commentary on the Constitution confirmed this understanding of the amendment. Justice Story in his *Commentaries on the Constitution* stated that under the Establishment Clause "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the

state constitutions." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833). The clause, according to Story, was merely designed to "prevent any national ecclesiastical establishment." *Id.* § 1871. Similarly, William Rawle, in his treatise on the Constitution, concluded that "[t]he first amendment prohibits congress from passing any law respecting an establishment of religion, or preventing the free exercise of it. It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1829), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 106 (Philip B. Kurland & Ralph Lerner eds., 1987).

Recent historical scholarship has further confirmed the jurisdictional nature of the amendment. Thus, the clauses have been described as an "exercise in federalism," as making "explicit jurisdictional policies that were already implicit in the constitutional order," and as preventing federal "interfer[ence] with any state's religious establishment laws."[9] Such analyses have shown that even

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[9] *See, e.g.*, AMAR, *supra*, at 32 (Establishment Clause "prohibited the national legislature from interfering with, or trying to *dis*-establish, churches established by state and local governments"); BRADLEY, *supra*, at 95 (Establishment Clause intended to make clear "that the national government may neither effect an establishment nor interfere with states that do"); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-18 (1995) ("The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism."); David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (noting the "federalistic motivation for the establishment clause"); Donald L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 650 (1999) (Establishment Clause "merely made explicit the jurisdictional policies that were already implicit in the constitutional order"); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41

Thomas Jefferson, whose references to "separation" of church and state form the basis for the Court's Establishment Clause jurisprudence, *see Everson*, 330 U.S. at 16, viewed the clause as a purely jurisdictional provision. *See* AMAR, *supra*, at 34 (observing that Jefferson "appears to have understood the states'-rights aspects of the original establishment clause"); DONALD L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 59-60 (2002) ("A careful review of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, that the national

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STAN. L. REV. 233, 307 (1989) (Establishment Clause was designed "to protect state religious establishments from national displacement"); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003) (Establishment Clause "prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion."); Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) ("[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment."); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (Establishment Clause "acts as a sort of 'federalism-based' guarantee that merely delineates the proper roles of the federal and state governments with respect to religious establishments"); William W. Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 910-11 (1987) (under the Establishment Clause, "Congress would have no power to interfere with any state's religious establishment laws, whatever they might be").

government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises.").[10]

In his Second Inaugural Address, for example, Jefferson made clear that, while the federal government lacked authority to pass measures pertaining to "religious exercises," the states remained free to do so:

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [i.e., federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.

Second Inaugural Address (March 4, 1805), 3 THE WRITINGS OF THOMAS JEFFERSON 378 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905). Similarly, in a letter to Samuel Miller, Jefferson maintained that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the states, as far as it can be in any human authority." Letter from Thomas Jefferson to Rev.

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[10] The relevance of Jefferson's views is also questionable given that he was not involved with drafting the First Amendment: "Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting). *See also* DREISBACH, *supra*, at 98-99 (Jefferson's "influence on the actual text of the First Amendment was at most indirect").

Samuel Miller (Jan. 23, 1808), *in* 5 THE FOUNDERS' CONSTITUTION 98 (Philip B. Kurland & Ralph Lerner eds., 1987).

This is not to say that Congress has no authority in matters of religion. The First Amendment merely prohibits legislation respecting an "establishment" of religion. *See* U.S. CONST. amend. I. In fact, the Framers specifically rejected more sweeping language that would have prohibited Congress from passing any law "touching religion." *See* 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789).

In exercising its enumerated powers, Congress remained free to enact measures that had the incidental effect of aiding or promoting religion. Thus, for example, the same Congress that drafted the First Amendment took a variety of measures that aided or promoted religion, including enacting legislation providing for paid chaplains and proclaiming a day of thanksgiving and prayer. *Lynch*, 465 U.S. at 674, 675 n.2; *Wallace*, 472 U.S. at 100-01 (Rehnquist, J., dissenting) (citing 1 ANNALS OF CONG. 914 (1789)). Indeed, Justice Story concluded that "the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868 (1833).[11]

[11] *See also* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 160 (1964) ("A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval."); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 113 (1997) ("There was nothing either in the text of the provision . . . or in Madison's explanation of its meaning to suggest either that it forbade Congress to provide impartial support to religion in general or that it entitled those with religious scruples to exemptions from generally applicable laws."); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 909 (1986) ("[T]he establishment clause was debated on the assumption that the government may have some power to aid religion.").

Nor does this mean that there are no constraints on state activity with respect to religion. Such activities would still be subject to the prohibitions found in the Free Exercise Clause as incorporated under the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).[12] To the extent a state engaged in activity that had the effect of impairing citizens' right to exercise their religious preferences, such actions would be constitutionally prohibited. *See Newdow*, 124 S. Ct. at 2332 (Thomas, J., concurring in judgment) (observing that "coercive state establishments" might be constitutionally prohibited); *Schempp*, 374 U.S. at 312 (Stewart, J., dissenting) ("That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized.").

B. Recognition of the jurisdictional nature of the Establishment Clause would be consistent with this Court's jurisprudence enforcing other aspects of the federal structure.

Recognition of the jurisdictional nature of the Establishment Clause would be consistent with the Court's jurisprudence in other areas in which it has given renewed emphasis to the structural guarantees embodied in the Constitution. *See, e.g., United States v. Morrison*, 529 U.S.

[12] The Free Exercise Clause is properly subject to incorporation, unlike the Establishment Clause, because it acts not as a structural guarantee, but rather protects individual liberties. *See* AMAR, *supra*, at 254-56.

598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

It is "incontestible that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). While the states "surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Id.* at 918-19 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)). This fundamental aspect of our constitutional system is "reflected throughout the Constitution's text." *Id.* at 919. In particular, residual state sovereignty is "implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Id. See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

Because the Constitution is "'an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.'" *New York*, 505 U.S. at 156 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)). Indeed, this has been "the Court's consistent understanding." *Id.*

This aspect of our constitutional structure represents a "'unique contribution of the Framers to political science and political theory.'" *Printz*, 521 U.S. at 921 n.11 (quoting *Lopez*, 514 U.S. at 575). The "separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921. "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *New York*, 505 U.S. at 181-82 (quoting *Ashcroft*, 501 U.S. at 458).

In implementing this division of authority, "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. Areas of fundamentally local concern such as marriage, *Trammel v. United States*, 445 U.S. 40, 50 (1980), domestic relations, *id.*, and criminal law, *Lopez*, 514 U.S. at 561 n.3, were reserved to the states.

Religion—and in particular decisionmaking by local governmental bodies concerning the public display of symbols that have religious meaning—is just such a uniquely local matter. Indeed, "it is common knowledge that the Constitution's framers thought that religion was a matter for the states, not for the national government . . . ." SMITH, *supra*, at 119. *See also* AMAR, *supra*, at 34 (observing that the Establishment Clause "calls for the issue [of establishment] to be decided locally"). Under our Constitution, "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions." *Ex parte Garland*, 71 U.S. 333, 397-98 (1867) (quoting STORY, *supra*, § 1878).

The same considerations that drove the Framers to reserve the power over matters of religion to the states apply today. There are dramatic cultural and religious differences both among and within the states. The Constitution's reservation of local control over matters touching upon religion wisely allows for a diversity of practices instead of imposing a judicially-enforced, uniform rule.

These structural principles, if not dispositive, should at a minimum inform the Court's Establishment Clause jurisprudence. Due regard should be given to the states' traditional role in matters of religion, particularly where, as here, the issue before the Court implicates local control over state or municipal property. *Cf. New York*, 505 U.S. at 161 (federal government may not "commandeer" or direct local authorities).

III. Even under the *Lemon* test, the Establishment Clause does not prohibit displays that have both religious and historical significance.

Even under the *Lemon* test—flawed as it is—the display of the Ten Commandments does not violate the Establishment Clause. This Court has emphasized that where public displays have both religious and historical significance, they do not constitute an "establishment" of religion. All that is required is that a display not be "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. That is the case here where the Ten Commandments have played an important role in the history of Western Civilization and the development of our legal system.

A. Displays of the Ten Commandments have both religious and historical significance.

The Court has consistently recognized that "religion has been closely identified with our history and government," *Schempp*, 374 U.S. at 212, that "[t]he history of man is inseparable from the history of religion," *Engel*, 370 U.S. at 434, and that "[i]nteraction between church and state is inevitable," *Agostini*, 521 U.S. at 233. There has been "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. At bottom, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

In particular, the Court has upheld public practices that have both historical and religious significance. *See Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, for example, the Court eschewed rigid application of the three-part *Lemon* test and upheld the Nebraska legislature's practice of opening legislative sessions with a prayer on the ground that it was "deeply embedded in the history and tradition of this

country." *Id.* at 786. In doing so, the Court noted the "unambiguous and unbroken history of more than 200 years" supporting such practices, which the Court concluded established "the practice of opening legislative sessions with prayer" as "part of the fabric of our society." *Id.* at 792.

So, too, the Ten Commandments are part of the "fabric of our society" in that they have played a significant historical role not only in the development of major religions and systems of secular morality, but also our legal system. *Cf. id.* at 783 (legislative prayer was a "tolerable acknowledgment of beliefs widely held among the people of this country"). As a direct result of their significant historical role in our society, the Commandments are posted on many public buildings, including this Court, the U.S. Capitol, various state capitols, and numerous federal courthouses. *See Aguillard*, 482 U.S. at 593-94 (observing that the Ten Commandments have not "played an exclusively religious role in the history of Western Civilization"); *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting) ("Undeniably, . . . the Commandments have secular significance . . . because they have made a substantial contribution to our secular legal codes.").

Even in *Stone* where the Court strictly applied the three-part *Lemon* formula and held that a specific Ten Commandments display in a public school violated the Establishment Clause, it further observed that such a display would have been appropriate if it had been "integrated into the school curriculum . . . in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citing *Schempp*, 374 U.S. at 225). The Court concluded that the particular Ten Commandments display was unconstitutional only because it "had no secular legislative purpose." *Id.* at 41. Here, the situation is much different, given that the display was associated with the historical role the Ten Commandments played in the development of legal and moral principles that

have had a significant impact on Western Civilization. *See Van Orden v. Perry*, 351 F.3d 173, 180 (5th Cir. 2003) ("The Ten Commandments have both a religious and secular message."). Its placement within a National Historical Landmark containing a variety of monuments regarding the history of Texas and its government further underscore the historical nature of the display. *See id.* at 182.

Thus, Petitioner's contention that the display of the Ten Commandments has "no secular purpose" is incorrect. (*See* Pet. Br. at 23.) As the Court recognized in *Stone*, the Ten Commandments have both religious and secular meaning. 449 U.S. at 42. Nor is Petitioner's contention that the display of the Ten Commandments must be barred because it "impermissibly discriminat[es] among religions" correct. (*See* Pet. Br. at 18.) Petitioner's test would require that all religious displays be prohibited, for it is impossible for a single display to relate to *all* religions. Moreover, even if such a display could be devised, it would still fail Petitioner's test because it would "impermissibly discriminate" against those who do not believe in God or religion. Quite simply, Petitioner's test would result in a complete prohibition of government acknowledgement of religion—something that is *not* required, but rather is *prohibited*—under this Court's precedents. *See Lynch*, 465 U.S. at 674 (noting the "unbroken history of official acknowledgment" of religion by the government).

Indeed, since the Court issued its decision in *Stone* and its subsequent ruling in *Marsh*, it has repeatedly upheld displays of symbols having religious significance to particular denominations where such displays manifest both a religious and secular meaning. *See, e.g., Pinette*, 515 U.S. at 766 (upholding display of a cross); *Lynch*, 465 U.S. at 684 (upholding display of a crèche); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (upholding display of a menorah). To exclude the Ten Commandments—part of the foundation of our legal system—would be inconsistent with

these prior rulings. Moreover, it would cleanse from the public square an important aspect of our nation's history.

B. The test under *Lemon* is an objective one.

The lower court properly applied the *Lemon* test. The test under *Lemon* is an objective one. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308 (test based on an "objective observer"); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (Court looks to "the 'objective' meaning of the [government's] statement in the community"). The constitutional analysis is based on the perceptions of a *reasonable* observer. *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring). *See also County of Allegheny*, 492 U.S. at 592.

The reasonable observer "is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in judgment) (quoting W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)). Consequently, the Court does not "ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.'" *Id.* at 780 (emphasis in original) (internal quotations omitted).[13] Rather, the standard is based on the

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[13] While courts may ascertain whether a state's articulation of a secular purpose is a "sham", the "Court is normally deferential to a State's articulation of a secular purpose." *Aguillard*, 482 U.S. at 586-87. Moreover, this aspect of the Court's jurisprudence should not be construed as an invitation to engage in a wide-ranging inquiry into the subjective beliefs of state actors. Such an invitation is inconsistent with this Court's precedents and would only lead to additional confusion.

perceptions of an *objective* observer. *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 308.

The lower court properly applied these principles in upholding the Ten Commandments display. As the court observed, the reasonable observer test precludes judicial decisionmaking based on the perceptions of "the uninformed, the casual passerby, the heckler, or the reaction of a single individual." *Van Orden*, 351 F.3d at 178. Rather, the reasonable observer standard "attempts to capture the 'concern with the political community writ large.'" *Id.* (quoting *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in judgment)). Based on this standard, the court properly concluded that "a State's display of the decalogue in a manner that honors its secular strength is not inevitably an impermissible endorsement of its religious message in the eyes of [a] reasonable observer. To say otherwise retreats from the objective test of an informed person to the heckler's veto of the unreasonable or ill-informed—replacing the sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment." *Id.* at 182. Indeed, the court observed that "[s]uch hostility toward religion is not only not required; it is proscribed." *Id.* at 178.

The disparate rulings in *Van Orden* and *McCreary* may largely be attributed to the degree with which the courts adhered to the objective test under *Lemon*. In contrast to the Fifth Circuit's analysis in *Van Orden*, the *McCreary* court rested its decision upon an extensive analysis of what it believed to be the subjective purposes of government officials. *See ACLU of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438, 457 (6th Cir. 2003). Such an approach is not supported by this Court's precedents. In determining whether the government intends to convey a message of endorsement or disapproval of religion, "a court has no license to psychoanalyze the legislators." *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring in the judgment).

Rather, courts must apply an *objective* analysis based on the perceptions of a *reasonable* observer.

At bottom, the subjective test implemented by the court in *McCreary* "not only misapplies the law, it also invites a new round of First Amendment challenges to religious texts and symbols that are nearly ubiquitous in non-schoolhouse public buildings throughout the nation." *ACLU of Kentucky v. McCreary County, Kentucky*, 361 F.3d 928, 933 (6th Cir. 2004) (Boggs, C.J., dissenting). When the constitutional test requires the courts to analyze the subjective, and often hidden, intentions of government actors it is sure to spur unwarranted and particularly divisive litigation. *See Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (observing that "Establishment Clause cases . . . stir deep feelings"). The courts and government actors require an objective test that provides them with clear guidance.

CONCLUSION

For the foregoing reasons, Eagle Forum ELDF respectfully requests that the Court uphold the states' legitimate authority to display the Ten Commandments and affirm the decision below.

Respectfully submitted,

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Dated: January 28, 2005

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS
AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE ETHICS AND PUBLIC POLICY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property on the walkway between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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BRIEF FOR THE ETHICS AND PUBLIC POLICY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The Ethics and Public Policy Center (EPPC) was established in 1976 to clarify and reinforce the bond between the Judeo-Christian moral tradition and the public debate over domestic and foreign policy issues. Its programs include research, writing, publication, and conferences.

EPPC affirms the political relevance of the great Western ethical imperatives—respect for the dignity of every person, individual freedom and responsibility, justice, the rule of law, and limited government. It maintains that moral reasoning is an essential complement to empirical calculation in the shaping of public policy.

EPPC is concerned that the Court's decision in this case (and in the companion case arising from the Sixth Circuit) could remove an important component of our moral tradition from the public spaces of our Nation. The Ten Commandments, which embody the ethical underpinnings of Western civilization and serve as an important historical foundation for our criminal and civil laws, are frequently displayed or depicted in public places or on public grounds. EPPC believes that such displays properly acknowledge and invoke our history and traditions.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

Petitioner and his like-minded friends at the ACLU and similar organizations would have this Court order the removal, defacement, or destruction of a symbolic monument that stands, as it has for many years, on the grounds of the Texas State Capitol, solely because the monument depicts the Ten Commandments that (according to the tradition of the world's major religions) God delivered to Moses for the edification of human civilization. Petitioner's request, although wrapped in the garb of the First Amendment, is in fact emblematic of a pernicious brand of intolerance for religion's role in American public life. By asking this Court to declare that the Texas monument and similar displays throughout our Nation offend the Constitution, petitioner seeks nothing less than a radical transformation of our national identity—from a land founded on and devoted to religious liberty and free expression to a place, unrecognizable to our forebears, where the merest public nod toward religious history or beliefs would be *verboten*.

The constitutional arguments have been fully briefed in this case and need not be repeated here. It suffices to say that whether the test is establishment or promotion, entanglement or endorsement, the public display of the Ten Commandments offends no First Amendment doctrine previously articulated by this Court. Rather than rehash the legal framework in which this decision will be made, EPPC respectfully submits this brief to address the *practical* ramifications of petitioner's challenge.

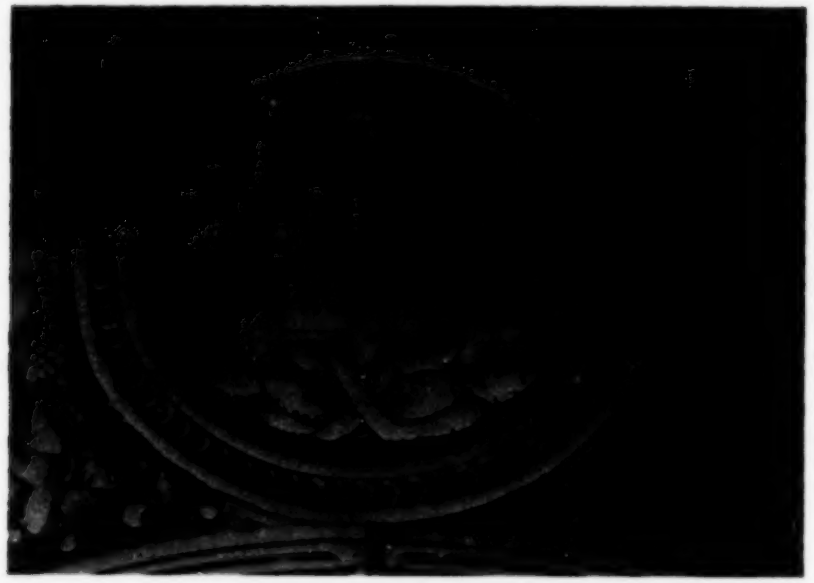
Religious iconography is an integral part of American public architecture. *See, e.g.*, Brief for United States in No. 03-1693 at 11, 1a-6a; Brief for American Center for Law and Justice in No. 03-1693 at 16-19. Symbols such as the Ten Commandments represent the will of the people as reflected in the halls in which they have chosen to install their respective governments. The Texas monument is neither unique nor isolated; to the contrary, the Decalogue motif has been

incorporated time and again by the artists and architects responsible for designing the halls of American government.

For example, in the Main Reading Room of the Library of Congress stands a large bronze statue of Moses holding the Ten Commandments:

This prominent statue is on display for the one million people who visit the Library of Congress each year. Similarly, the recently completed Ronald Reagan International Trade Building features a very large statue with the Ten Commandments that is visible to all who pass along Pennsylvania Avenue:

And the millions of visitors to the National Archives pass over a bronze plaque inscribed with the Decalogue tablets:



Indeed, Decalogue imagery graces the homes of all three Branches of our federal government. Moses and the Ten Commandments appear on both the south frieze of the courtroom in which this Court sits and the pediment of the Court's building:

The traditional incorporation of the Ten Commandments and similar symbols into America's public architecture is a reflection and recognition of our cultural heritage and history—a long-standing practice of religious *tolerance* that acknowledges the cultural role of religious allegory without compelling anyone to adhere to a particular belief system. In the case of the Ten Commandments, for example, this iconography serves to remind us that the most fundamental tenets of Anglo-American law—the basic prohibitions against murder, theft, and the like—have roots that reach back to the dawn of recorded history.[2]

This established practice of integrating the Ten Commandments and other religio-historical symbols into the fabric of our public institutions has been repeated over and over again in the multitudinous town halls, public parks, courthouses, educational institutions, and state capitals throughout this Nation. In statues, paintings, sculptures, friezes, murals, and the like, religious iconography has been part and parcel of American public architecture since the Founding. It is fair to say that the inclusion of such iconography is the norm rather than the exception.[3]

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[2] It is for this reason that Moses and the Ten Commandments often appear in the company of other lawgivers, such as Hammurabi or Mohammed. But with or without such "contextual" icons, the Ten Commandments are sufficiently integral to our shared history and traditions to stand unchallenged as a proper element of American public architecture.

[3] The images reproduced in this brief come from a photographic essay that vividly captures the prominence and prevalence of religious symbols in and around public buildings in the District of Columbia *alone*. *See* Carrie Devorah, *God in the Temples of Government*, Human Events, Nov. 24, 2003, at 14, & Dec. 22, 2003, at 20. In addition to these photographs, Ms. Devorah has accumulated numerous other examples of religious iconography on public properties that will be published in a forthcoming book. An illustrative, but by no means exhaustive, list of government properties outside of the District of Columbia that contain Ten Commandments monuments can be found in the appendix to the brief for the United States in the companion case.

This Court is not the appropriate body to revisit more than two centuries of architectural history by ordering the wholesale removal or destruction of symbols—including particularly representations of Moses and the Ten Commandments—that have heretofore been regarded, correctly, as important parts of our collective experience warranting recognition in and around the public spaces of our Nation. The Court should resist petitioner's invitation to sit as the Supreme Board of Architectural Review, with authority to override the public's decisions regarding the appropriate symbology, reflecting our long and varied traditions, with which to ornament government places.

Petitioner seeks to outlaw, as unduly "religious," a historical tradition that unquestionably has contributed to the legal and ethical foundations of this Nation and that the finest architects in the Republic have seen fit to include as part of our collective story. A finding that such symbology violates the First Amendment would unprecedentedly, and unnecessarily, remove an important element of our cultural heritage from the public realm, causing great loss to future generations as they seek to appreciate America's rich and pluralistic history.

And the intolerant fervor of petitioner and his confreres does not stop at the Ten Commandments. Recent months have seen attacks on a cross at a World War I memorial in the Mojave National Preserve, a cross in the official seal of Los Angeles County, and the tradition of offering prayers at the Presidential inauguration. The Pledge of Allegiance, with its reference to God, has but recently been before this Court; and our currency continues to refer to the national trust in a deity. The present effort to eradicate Ten Commandments iconography is merely one piece of an overall strategy to eradicate all such references to religion from our public life.

Implementing the counter-historical regime that petitioner posits would require this Court to authorize, if not compel, a phalanx of bulldozers, jackhammers, chisels, sandblasters, and other instruments of destruction to wipe out all

references to religious history from American public buildings. An order requiring the removal of the Ten Commandments monument from the grounds of the Texas statehouse would be but a sliver removed from a directive to remove the Decalogue emblem from the doors of this Court:

A holding that the First Amendment proscribes the display of the Ten Commandments on public property could—and, if petitioner and the ACLU have their way, would—lead to the desecration of every public building that contains a sculpture, frieze, engraving or other representation of the fundamental law.

History has not looked kindly on those who would deny or destroy their heritage—religious or otherwise—and the Court's decision in this case will be judged in the sharp light of history by generations to come. The Court is now being asked to decide whether it is possible to preserve and respect our cultural and religious artifacts, as incorporated into the public architecture of our country, without the government's having been deemed to have "established" a religion. The well-traveled path of tolerance and inclusion should lead the Court to answer that question in the affirmative, and, accordingly, to affirm the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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January 31, 2005

(36)

Supreme Court, U.S.
FILED
JAN 3 1 2005

No. 03-1500

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THOMAS VAN ORDEN,

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RICK PERRY, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

CORRECTED COPY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE FAITH AND ACTION, INSTITUTE IN BASIC LIFE PRINCIPLES, INTERNATIONAL REAPERS FOUNDATION, THE NATIONAL CLERGY COUNCIL, AND COMMITTEE OF CONCERNED CITIZENS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Faith and Action, Institute in Basic Life Principles, International Reapers Foundation, the National Clergy Council, and Committee of Concerned Citizens representing the voice of literally thousands of citizens across the United States join together in this Amici brief, as they did in *McCreary v. ACLU*, to resist the continuous and expanding efforts to eliminate from our government and public life any recognition of God and his moral law, all under the guise of religious liberty, resulting in the endorsement by government of atheism. This evil menace, like a giant squid, is reaching its tentacles into every aspect of our lives spewing its poison of secular humanism. The moral fabric of our society is slowly being destroyed and atheism, which is anathema to this nation's Declaration of Independence, is being promoted with its secular humanism.

SUMMARY

The brief of Amici filed in *McCreary v. ACLU* contended the Declaration of Independence is the foundational law governing "religious expression," not the First Amendment. Further it is contended that the created characterization "separation of church and state" not only is a misnomer, but has been manifestly misapplied. This brief continues to advocate that hypothesis.

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief. The Petitioner has consented to the filing of all briefs. The consent of the Respondent is being lodged herewith.

INTRODUCTION

Since *Everson v. Board of Education*, 330 U.S. 1 (1947) the rhetoric in the decisions seems increasingly to recognize that a conundrum exists. For example in *Abington v. Schempp* 374 U.S. 203, 231 (1963) the court observed that ". . . the fact is that the line which separates the secular from the sectarian in American life is elusive . . ." Justice O'Connor likewise in *Wallace v. Jafree*, 472 U.S. 38 (1985), observed that something more must be done than ". . . erecting a constitutional signpost (citation omitted) to be followed in any particular case in which our predilections may dictate." Justice Kennedy in *Alleghany v. ACLU*, 492 U.S. 573 (1989) complained the endorsement test had to be twisted to avoid inconsistencies with practices permitted in the past ". . . while condemning similar practices with no greater endorsement affect simply by reason of their lack of historical antecedent. (FN 10) Neither result is acceptable."

These Ten Commandment cases must not be viewed as isolated issues with individual solutions. They are actually linked with all the "establishment clause" cases and have a common solution. Unless that common cause is dealt with, this kind of destructive litigation will continue to escalate unabated. The volume of "establishment clause" and related cases has already reached the point it is utterly impossible for this court to properly monitor the results, much less keep pace with the consequence in public life of their rulings. Public officials, including school authorities, have developed their own personal interpretation of court opinions resulting in the imposition of irrational and unconstitutional restrictions. A current illustration of the awesome confusion is demonstrated in the case of *Williams v. Vidmar*, No. CO44946, USDC, N. Dist. San Jose Div. where the use of the Declaration of Independence itself is at issue because of its reference to God. A teacher was prevented from handing

out excerpts on the Declaration of Independence and other historical documents on the role of religion in the nation's history.[2] On the same point of law, *Engle v. Vitale* 370 U.S. 421, 435 n.21 (1962) seems to expound opposing rhetoric:

> . . . [T]here is of course nothing in the decision reached here that is inconsistent with the fact that schoolchildren and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

What a tragedy that it becomes necessary to litigate the ability to expound the principles contained in the foundational philosophy of this nation contained in the Declaration of Independence. Without such organizations as Liberty Council, American Center for Law and Justice, and others of similar purpose, how in the world could an individual have the resources and the ability to carry-on the fight for religious freedom?

It is self-evident of course that law is not an abstract proposition; it is designed to govern human behavior. Violation of a law is demonstrated not by argument but by evidence. Again it is axiomatic that one cannot be forced to believe what he does not want to believe, but on the other hand he can be required to behave in a particular way in obedience to the law for the common good of society. Law

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2. A school can hand out condoms, often without the parent's consent, but not the Word of God contrary to the principles in the Declaration of Independence, the foundation of this nation.

consequently constitutes a restriction on an individual's liberty. If the Declaration of Independence contains the moral law which is not being enforced because it is confused with the First Amendment "freedom of religious belief," the result will be an ever increasing extension of immoral license. Depending on the length of time that such confusion exists, there will be evidence of an escalating moral breakdown.

Everson failed to accurately demarcate the boundaries between the moral law of the Declaration, and the "religious doctrinal position" in the First Amendment. In an effort to find a way through the "wilderness" to reach a presumed objective, a "hoped for" solution was engineered. The Court artfully converted the constitutional phrase "Congress shall make no law," to mean that a Priest, Rabbi, or a teacher for example is "Congress," and that the Ten Commandments, a prayer, or carrying a Bible to school, even writing a paper about Jesus Christ in an English class constitutes "a law."

As a result, the Court has created for itself a chimerical task with nothing more tangible to guide them than a "movable metaphor" and a variety of subjective evaluations based upon their own predilections.

OUR PHILOSOPHY OF GOVERNMENT IS GOD'S MORAL LAW

The Declaration of Independence clearly establishes a Philosophy of Government which is the foundation of law in the United States. That law is to be distinguished from the term "religion" as found in the First Amendment. Since the First Amendment cannot be repugnant to the Declaration, it logically follows that the term "religion" must have a meaning different than the provisions of the Declaration. The Declaration in clear unmistakable English states that: "We hold these truths to be self-evident, that all men are

created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness." That establishes the foundational moral law of this nation. The following from the historical record is consistent with the conclusion that the Declaration was intended to be the law given by a Supreme Being that was superior to and higher than human law.[3]

> All [laws], however, may be arranged in two different classes. (1) Divine. (2) Human. . . . But it should always be remembered that this law, natural or revealed, made for man or for nations, flows from the same Divine source: it is the law of God. . . . Human law must rest its authority ultimately upon the authority of that law which is Divine.[4] (James Wilson)

> [T]he law . . . dictated by God Himself is, of course, superior in obligation to any other. It is binding all over the globe, in all countries, and at all times. No human laws are of any validity if contrary to this.[5] (Alexander Hamilton)

The *Declaration is a legal document, not a document of*

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3. *See* pp. 14, 15, 16, Amici brief filed in McCreary v. ACLU, No. 03-1693 for additional commentary on law.

4. James Wilson, *The Works of the Honorable James Wilson*, Bird Wilson, Editor (Philadelphia: Lorenzo Press, 1804) Vol. 1, pp. 103-105, "Of the General Principles of Law and Obligation."

5. Alexander Hamilton, *The Papers of Alexander Hamilton*, Herald C. Syrett, editor (New York: Columbia University press, 1961) Vol. 1 p. 87, p. 87, Feb 23, 1875, quoting William Blackstone, Commentaries on the Law of England

religion. It is part of the Constitution both in spirit and content. John Adams said: "if 'thou shalt not covet,' and 'thou shalt not steal,' were not Commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."[6] Modern day courts have confused the term "religion" with the content of the Declaration pertaining to God and His Laws... The phrases in the Declaration, "laws of nature" and "nature's God" were chosen because they conveyed a precise and universally understood meaning and clearly defined in Blackstone.[7] That those terms are rooted in God's word are not really debatable.

John Jay, first Chief Justice of the Supreme Court, said ". . . Natural law was given by the Sovereign of the universe to all mankind."[8] Zephaniah Swift who wrote America's first law text agreed stating: "The . . . Supreme Deity . . . [Gave] those general and immutable laws that will regulate their operation through the endless ages of eternity . . . are denominated the laws of nature."[9] Samuel Adams contributed: "All men . . . are equally bound by the laws of nature, or to speak more properly, the laws of the Creator."[10] Noah Webster commented that the ". . . 'law of nature' is a

6. John Adams, *A Defense of the Constitution of Government of the United States of America* (Philadelphia: William Young, 1797), Vol. III, p. 217.

7. James Iredell's Charge to the Grand Jury in the *Case of Fries* [9 Fed. Cas. No. 5,126, (C. C. D. Pa. 1799).

8. John Jay, *The Life of John Jay*., William J., Editor (New York: J& J. Harper, 1833), Vol. II, p. 385.

9. Zephaniah Swift, A System of the Laws of the State of Connecticut (John Byrne, 1795), Vol. I, pp. 6-7.

10. Samuel Adams, *The Writings of Samuel Adams*, Harry Cushing, Editor (New York: G.P. Putnam's Sons, 1908), Vol. IV, p. 356.

rule of conduct . . . established by the Creator . . . denominated in Scripture . . ."[11]

James Wilson, a signer of the Constitution said: ". . . human law must rest its authority ultimately upon the authority of that law which is Divine."[12] Rufus King added his additional comment: ". . . Law established by the Creator, which has existed from the beginning . . . [Is] binding upon mankind . . . [This] is the law of God by which He makes his way known to man and is paramount to all human control."[13]

Were the Ten Commandments considered part of that moral law of God? John Quincy Adams said that ". . . [T]he law given from Sinai was civil and municipal . . . as well as a moral and religious code . . . [it was] essential to the existence of men in society and most of which have been enacted by every nation which ever professed any code of laws[14] . . . It would be a vain search among the writings of profane antiquity . . . to find so broad, so complete and so solid a basis for morality as this Decalogue lays down."[15] William Findley who served in Congress when John Quincy Adam's father was President corroborated what was just said: ". . . This law, which is commonly called the Ten

11. Hamilton, *Papers*, Vol. I p. 87, February 23, 1775, quoting from Blackstone.

12. James Wilson, *The Works of the Honorable James Wilson*, Bird Wilson, Editor (Philadelphia: Lorenzo Press, (1804), Vol. I, pp. 103-105, "*Of the General Principles of Law and Obligation.*"

13. Rufus King, *The Life and Correspondence of Rufus King*, Charles R. King, Editor (New York: G.P. Putnam's Sons, 1900), Vol. VI, p. 276.

14. John Quincy Adams, *Letters . . . To His Son*, p. 61

15. John Quincy Adams, *Letters . . . To His Son*, Pp. 70-71.

Commandments or Decalogue . . . was in fact incorporated into the judicial law."[16]

John Witherspoon, a signer of the Declaration, said: "The Ten Commandments . . . are the sum of the moral law . . ."[17] Noah Webster said: "The opinion that human reason left without the constant control of Divine laws and commands will . . . give duration to a popular government is as chimerical as the most extravagant ideas that enter the head of a maniac. . . ."[18] James McHenry, a signer of the Constitution; Robert Winthrop, a speaker the House of Representatives; Daniel Webster; David Ramsey, a member of the Continental Congress; Dwight Clinton , who drafted the 12th amendment, among others agreed the Ten Commandments represent the substance of the moral law.

Daniel Webster argued by implication in the case of *Vidal v. Gerard's Executors*, 43 U.S. 126,175 (1844) that not only should the Ten Commandments be displayed, but their teaching should be a part of the moral instruction to prevent national moral decay:

> Both in the Old and New Testaments its importance [i.e., the religious instruction of youth] is recognized. In the Old it is said: Thou shall diligently teach them to thy children.

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16. William Findlay, Observations on "The Two Sons of Oill," (Pittsburgh: Patterson in Hopkins, 1812), pp. 22-23.

17. Witherspoon, *Works (*1815), Vol. IV p. 95, "Seasonable Advice to Young Persons," Sermon XIX, Feb. 21, 1762.

18. Noah Webster, *Collection of Papers*, pp. to 91-292, from his Reply to a Letter of David McClure on the Subject of the Proper Course of Study in the Girard College, Philadelphia. New Haven, October 25, 1836.

THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION ARE ONE HARMONIOUS DOCUMENT

It is well established that the Declaration of Independence and the Constitution constitute one harmonious document. The Constitution, built upon the foundational principles of the Declaration, is designed to protect the rights established in the Declaration and shall not violate the provisions of the Declaration. John Quincy Adams made this extraordinarily clear in a speech he delivered at the New York Historical Society on April 30, 1839:

> The Declaration was America's charter . . . the act [Constitution] . . . forming with it one entire system of national government . . . All this is by the Laws of Nature and of Nature's God, which of course presuppose the existence of a God, the moral ruler of the universe in a rule of right and wrong, of just and unjust, binding upon men, preceding all institutions of human society and of government . . . now the virtue which had been infused into the Constitution of the United States, and was to give to it its vital existence, the stability and duration to which it was destined, was no other than the concretion of those abstract principles *which had been first proclaimed in the Declaration of Independence-namely, the self-evident truths of the natural and unalienable rights of man . . . always subordinate to . . . the Supreme Ruler of the universe . . . that was the platform upon which the Constitution of United States had been erected . . . consisted in its conformity to the principles proclaimed in the Declaration of Independence. . . .*

(Emphasis added).

Alexander Hamilton concurred saying the Constitution is nothing but the body and letter of the Declaration which is its thought and spirit.[19] He added that the law was dictated by God Himself and that no human law was of any validity contrary to God's law.[20]

In a turn-of-the-century case the court held: "The latter [Constitution] is but a body and the letter of which the former [Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the Spirit of the Declaration of Independence." *Gulf, Colorado and Santa Fe Railroad Co. v. Ellis*, 165 U.S. 150, 160 (1897).

Justice Douglas in *McGowan v. State of Maryland*, 366 U.S. 420 (1961) reiterated the well established conclusion that there is a higher authority than that of the State, and a ". . . moral law which the State is powerless to alter . . . ," and that the "principles" of the Declaration are enshrined in the Constitution and the Bill of Rights.

In his speech at "The Jubilee of the Constitution" John Quincy Adams made it clear that the Constitution was to operate on the principles declared in the Declaration of Independence stating:

> [T]he virtue which had been infused into the Constitution of the United States . . . was no other than the concretion of those abstract principles which have been first proclaimed in the Declaration of Independence. . . .This was the

19. *The Federalist*, p. 275, Federalist # 49 by Alexander Hamilton.

20. Alexander Hamilton, *The Papers of Alexander Hamilton*, Harold C. Syrett, Editor (New York: Columbus University Press, 1961), Vol. I , p. 87, February 23, 1775

> platform on which the Constitution of the United States had been erected. . . . [And] was to depend upon the . . . principles proclaimed in the Declaration of Independence and embodied in the Constitution the United States.[21]

President Lincoln, after reciting the provisions of the Declaration, stated the same obvious conclusion:

> . . . They erected a beacon to guide their children, and their children's children, [T]hey established these great self-evident truths that . . . their posterity might look up again to the Declaration of Independence and take courage to renew that battle which their fathers began, *so that truth and justice and mercy and all the humane and Christian virtues might not be extinguished from the land. . .*[22]

(Emphasis supplied).

THE "WALL" IS IN THE WRONG PLACE

What an interesting discussion that would be with President Jefferson concerning his letter to the Danbury Baptists. In my imagination I could hear him saying that he wanted to clear up the misunderstanding. The interpretation given to his letter was an explicit contradiction of the Declaration's Philosophy of Government which he had so carefully and laboriously drafted. The wall described in his

21. John Quincy Adams, *The Jubilee of the Constitution* (New York: Samuel Coleman, 1839), p. 54.

22. Abraham Lincoln, The Works of Abraham Lincoln: Speeches and Debates, John H. Clifford, Editor (New York: the University Society Inc., 1908), Vol. III, pp. 126-127, August 17, 1858.

letter *had been erected by the court in exactly the wrong place*. His "wall" was *not* intended to prevent the free exercise of religion, rather Jefferson would say he was making it very clear that the metaphor he was using was specifically intended to illustrate that *government could not in any way prohibit the free exercise of religion.* That the letter was written to a particular denomination further underscores the fact that "religion" as used in the First Amendment is of denominational derivation.

It thus becomes mandatory to secern that the created term "separation of church and state" not only constitutes a constitutional misnomer, but in addition has been grossly misapplied.

Mr. Jefferson would most certainly observe that he and James Madison had gotten a lot of attention they did not deserve. There were 90 representatives in Congress that adopted the Bill of Rights. Reading the modern-day opinions, however, it would appear that Madison and Jefferson alone were responsible for drafting a Bill of Rights.[23] The fact of the matter is that Jefferson was in France and took no part in either the adoption of the Constitution or the Bill of Rights. Ironically, Mr. Madison described as almost solely responsible for drafting the First Amendment was initially opposed to the Bill of Rights. He ultimately agreed realizing the Constitution would not be adopted without one, but very few of his suggestions made it into the final version of the First Amendment[24]

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23. I do not recall ever seeing in a decision the names of George Mason or Fisher Ames who were primarily responsible for the Bill of Rights.

24. *The Debates and Proceedings in the Congress of the United States* (Washington, DC.: Gales & Seton, 1834) Vol. I, pp. 440-948; See also *Wallace V. Jaffree*, 472 U.S. 38, 93-99, Rehnquist, J. (Dissenting).

Remembering the case of *Marbury v. Madison*, Jefferson might humorously observe to Judge Marshall, "That's the problem with judges, they can twist a clear expression into something that creates a major problem," and then comment:

> It has long, however, been my opinion, and I have never shrunk from its expression . . . that the germ of dissolution of our Federal Government. . . . Is in the constitution of the federal Judiciary; working like gravity by night and by day, gaining a little to day and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped.[25]

A glaring inconsistency in the current establishment clause conclusions must readily be admitted when on August 7, 1789, at the same time the Bill of Rights was being sent to the states for approval, President Washington signed into law the Northwest Ordinance. The Ordinance contained only one section which addressed *both* religion and public education, and actually coupled them legally together in the same Article III:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

The Declaration of Independence, Articles of Confederation, the Northwest Ordnance, and the Constitution are recognized as the *organic laws* of this nation in the *United States Code Annotated*.

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25. Thomas Jefferson, *Writings of Thomas Jefferson*, Albert Ellery Bergh, editor (Washington DC: Thomas Jefferson Memorial Association, 1904) Vol. XV, pp. 331-332, to Charles Hammond on August 18, 1821.

The "moral law" in the Declaration, must be clearly distinguished from the term "religion" in the First Amendment. If that distinction is not made, a constitutional conflict is arbitrarily created. In the words of an old song "pandemonium is liable to walk upon the scene." Since a constitutional conflict cannot legally exist except by misinterpretation, to restore constitutional harmony, it becomes essential that the "location" of the "wall" be moved to make sure that the Federal government does not in any way interfere with the "free exercise of religion."

THE WARNING

A clause in the Declaration that had profound significance for the Founders and is equally applicable to each one of us today, is the phrase used by the founders, ". . . Supreme Judge of the world for the rectitude of our intentions [an old English word meaning 'moral uprightness']. . . ." It is not mere historic rhetoric in an historic document. It contains an ominous warning that we ignore at our peril. The time is already very late.

That phrase actually anchors the legal conclusion that the Declaration is to govern the decisions on what are characterized as "establishment clause" cases, not the First Amendment. The portion of the phrase, "rectitude of our intentions," coupled with "Supreme Judge of the world," represents that God will judge a nation or an individual on His absolute standard of morals. It is thus incumbent for this nation to proclaim publicly the moral principles contained in the Declaration. There is no court decision that can alter God's judgment to which the court itself is subject. It is not man's law that is being dealt with by a court, it is God's law. This is serious business. The Founders understood that the phrase, "Supreme Judge of the world," established the reality of eternal judgment. It was the specter of judgment on which

their oath of office was taken. The founders understood that they would ultimately stand in judgment based upon those moral laws.

A House Judiciary Committee declared: "Laws will not have permanence or Power without the sanction of religious sentiment—without a firm belief that there is a Power above us that will reward our virtues and punish our vices."[26]

In an argument before the Supreme Court, Daniel Webster stated: "What is an oath? [I]t is founded on a degree of consciousness that there is a Power above us that will reward our virtues or punish our vices. . . . [O]ur system in all our courts, by which we hold liberty and property and all our rights, are founded on or rest on Christianity and a religious belief."[27]

Samuel Adams explained: [Divine] Revelation assures us that "righteousness exults a nation" [Proverbs 14:34]. Communities are dealt with in this world by the wise and just Ruler of the Universe. He rewards or punishes them according to their general character."[28] George Mason, the father of the Bill of Rights, reminded the delegates at the Constitutional Convention: "as nations cannot be rewarded or punished in the next world, so they must be in this. By an

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26. *Reports of Committees of the House*, p. 8.

27. Daniel Webster, Mr. Webster's *Speech in Defense of the Christian Ministry and in Favor of the Religious Instruction of the Young*, Delivered in the Supreme Court of the United States, February 10, 1844 in the Case of Stephen Girard's Will (Washington: Gales and Seton, 1844), Pp. 43, 51.

28. Samuel Adams, *The Writings of Samuel Adams*, Harry Alonzo Cushing, Editor (New York: G.P. Putnam's Sons, 1907), Volition, p. 286, to John Scollay on April 30, 1776.

inevitable chain of causes and effects, Providence punishes national sins by national calamities.[29]

Speaking before the Massachusetts Legislature in 1791, Chandler Robbins declared:

> The Supreme Governor of the World rewards or punishes nations and civil communities only in this life. . . . Political bodies are but the creatures of time. They have no existence as such but in their present State; consequently, are incapable of punishments or rewards in the future. We can conceive no way in which the Divine Being shall therefore manifest the purity of His nature . . . toward such societies but by rewarding or punishing them here, according to their public conduct.[30]

President George Washington warned this nation in his "Inaugural Address" of that principle: "The propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven Itself has ordained."[31]

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29. James Madison, *The Papers of James Madison*, Henry Gilpin, Editor (Washington: Langtree and O'Sullivan, 1840), Vol. III p. 1391, August 22, 1787.

30. Chandler Robbins, *A Sermon Preached before His Excellency John Hancock, Governor et al.* (Boston: Thomas Adams, 1791), p. 32.

31. *American State Papers: Documents Legislative and Executive of the Congress of the United States* (Washington: Gales and Seton, 1833), Vol. I, pp. 9-10, April 30, 1789.

President Thomas Jefferson cautioned:

> I tremble for my country when I reflect that God is just: His justice cannot sleep for ever.[32]

This was the punishment of God against a nation or an individual who violated His moral law. No matter what an individual might believe, death is inevitable for everyone, as well as future reward or judgment. How each individual deals with his eternal destiny is a religious matter and protected against encroachment or control by the federal government. The moral law of God as expressed in the Declaration of Independence is to be proclaimed in public life as a moral standard which is to govern individuals. Fisher Ames, who was the author of the House language of the First Amendment said: "Government . . . is a firm compact sanctified from violation by all the ties of personal honor, morality, and religion."[33] Charles Carroll, a signer of the Declaration, said: "Without morals the republic cannot subsist any length of time. . . ."[34] Oliver Ellsworth, Chief Justice of the U.S. Supreme Court, said: [T]he primary objects of government are the peace, order and prosperity of society . . . in a republican government good morals are essential."[35] Benjamin Franklin said: "[O]nly a virtuous people are capable of freedom. As nations become corrupt

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32. Thomas Jefferson, *Notes on State of Virginia* (Philadelphia: Matthew Cary, 1794), P. 237, Query XVIII.

33. Fisher Ames, *The Works of Fisher Ames*, Seth Ames, Editor (Indianapolis: Liberty Classics, 1983), Vol. I, p. 67.

34. Bernard C. Steiner, *The Life and Correspondence of James McHenry* (Cleveland: The Boroughs Bros. Co., 1907), p. 475, Charles Carroll to James McHenry on November 4, 1800.

35. *Connecticut Courant*, June 7, 1802, p. 3.

and vicious, they have more need of masters."[36] George Mason called the father of the Bill of Rights said: ". . . Justice and virtue are the vital principles of Republican government."[37]

Those warnings are for us today. They are very modern. They echo in the chambers of our modern-day minds and clamor for our attention. The evidence of moral collapse is all about us. We refuse to listen to these warnings at our peril. It is very late.

Here are some comparisons of court decisions on morals in the 1800's and modern-day jurisprudence. In 1985, Cassie Grove, a high school sophomore, had been required to read *A Learning Tree* for her English Literature class. She objected to being forced to read several portions. The court in *Grove v. Mead School District*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826, ruled against her and found that students taking that class would be required to read the book containing much offensive language including the following:

> Declaring Jesus Christ to be a 'poor white trash God,' or 'a long legged white son-of-a-b__h.'

In *People v. Ruggles*, 8 Johns 545 (Sup. Ct. NY. 1811) Ruggles had used the following language: "Jesus Christ was a bast__d, and his mother must be a whore." The court found Ruggles guilty and said:

> Such words . . . were an offense at common law . . . [I]t tends to corrupt the morals of the people, and to destroy good order. Such offenses . . . are treated as affecting the essential interests of civil society.

36. Benjamin Franklin, *The Works of Benjamin Franklin*, Jared Sparks, editor (Boston: Tappan, Whitmore and Mason, 1840), Vol. X, p. 297, to Messrs. The Abbes Chalut and Arnaud on April 17, 1787.

37. Henry, *Correspondence*, Vol. II, p. 185, from George Mason to Patrick Henry, May 6, 1783.

In *Cohen v. California*, 403 U.S. 15, 18, 20, 25 (1971) Cohen wore a jacket bearing the words "F___the Draft" in a corridor of the Los Angeles Courthouse. The California statute which prohibited the public use of such words was found unconstitutional as violating his freedom of expression guaranteed by the 1st and 14th Amendment. The court found this was not an obscenity case and although "the air may at times seem to be filled with verbal cacophony . . . in this sense it was not a sign of weakness but of strength."

In contrast, the Supreme Court in *People v. Ruggles*, *supra.* (1811) stated:

> Nothing could be more offensive to the virtuous part of the community or more injurious to the tender morals of the young, than to declare such profanity lawful . . . and shall we form an exception in these particulars to the rest of the civilized world?

In the case of *Erznoznik v. City of Jacksonville*, 422 U.S. 205, (1975) the city of Jacksonville was seeking to restrict adult movies shown in a public drive-in theater because the screen was facing a church and two public streets frequented by children. The Supreme Court striking down the ordinance explained that it could not ". . . be justified as an exercise of the [city] . . . for the protection of children."

In direct contrast, *Commonwealth v. Jesse Sharpless and Others*, 2 Surge. & R. 91, 103, 104 (Sup. Ct. Penn. 1815) the court came to the exact opposite decision:

> The destruction of morality renders the power of the government invalid . . . The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and

> obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences. . . . No man is permitted to corrupt the morals of the people.

Evil does not stand still. In today's society pornography and child pornography are rampant. Current news reports state that a study shows that oral sex is rampant in the grade schools. In light of the moral mess in our school system, and with the apparent inability to confront young people with God's moral standards of life, the statistics in the appendix ought to be convicting of the need to reestablish publicly the foundational principles contained in the Declaration and rule that a display of the Ten Commandments, Bible reading, prayer, and the ability to teach the historic record of the place that Christian principles played in the development and founding of this nation is consistent with the principles of the Declaration. The words of the Supreme Court in *Stone v. Graham*, 449 U.S. 39 (1980) haunt my mind when in contrast to what is being permitted in the public schools the court said that a display of the Ten Commandments was unconstitutional because students might read, meditate upon, respect, or obey them. A recent article by the Associated Press stated that according to the American Medical Association, "sweet alcoholic drinks" were being aggressively marketed to young people and are luring troubling numbers of adolescents-especially girls-to engage in drinking. A nationwide poll by the AMA of 741 12 to 18-year-olds found that 31% of the girls and 19% of the boys had consumed these drinks.

Grotesque nudity is displayed on TV where it can be seen by children. Filthy videos can be purchased, all apparently under the guise of freedom of expression. Just recently in two separate nationally televised football games on primetime when children could be watching, two instances of sexually provocative nudity were displayed.

The Trivialization of God by McCullough at page 90 contains an article from the *New York Times*:[38]

> Sin isn't something that many people, including most churches, have spent much time talking about or worrying about through the years of the (cultural and sexual) revolution. But we will say this for sin; it at least offered a frame of reference for personal behavior. When the frame was dismantled, guilt wasn't the only thing that fell away; we also lost the guide-wire of personal responsibility . . . Everyone was left on his or her own. It now appears that many wrecked people could have used a road map.

God's laws are superior and cannot be rationalized. The content of the Declaration of Independence established unconditionally that ". . . all men are created equal . . ." Slavery was a rank violation of moral law established in the Declaration. In the case of *Dread Scott v. Sandford*, 60 U.S. 393 (How.) (1856) the court rationalized that provision holding it did not apply to ". . . the enslaved African race . . ." God's retribution to this nation for that violation was a bloody civil war, the consequences with which this nation still lives. Apparently we have not gotten the message as courts continue to violate the Declaration by extracting God and his principles from our public life.

We are on a disastrous course. A modern day comparison is contained in the Nuremberg trials. At the end of World War II, Associate Justice Robert Jackson of the United States Supreme Court was appointed by President Truman as the chief prosecutor for the United States at Nuremberg;[39] the prosecution

38. It originally appeared as an editorial in the *Wall Street Journal* December 1991, http://www.aidsinfobbs.org/articles/wallsj/91/394).

39. See the Nuremberg trial record from which these comments are taken.

of the Nazi war criminals was predicated on the fact that a Supreme Being had established absolute laws that transcended human laws. The defense of expo-facto by the Nazis was that they were simply obeying the laws of their government. They were found guilty of crimes against humanity as charged in the indictment based upon God's absolute moral laws to which human laws must bow.

There appears to be a distinct parallel between Nuremberg and those who oppose the public expression of the moral laws of God, including the Ten Commandments, as contained in the Declaration of Independence. The following illustrations are taken from the actual Nuremberg trial record for comparative purposes. (All emphasis have been supplied)

- ". . . Religious persecution was cloaked in the language of *religious liberty* . . ."

- "The Nazi party was always predominantly *anti-Christian in its ideology*. . . ."

- ". . . *Educational institutions* were suppressed or *subjected to* requirements of Nazi *teaching inconsistent with the Christian faith*."

- ". . . The law was what the Nazis said it was. . . ."

- ". . . Conduct which is a crime in the moral sense must be regarded as innocent in law"

- "More and more of the people must be separated from the churches . . . This influence must be broken completely and finally. . . . Not until this has happened, does the State leadership have influence on the individual citizens"

- "[The Nazi] program must reckon with the opposition of the Christian Church . . . 'national socialism and Christian concepts are irreconcilable' and the people must be separated from the churches and *the influence of the churches totally removed*."

(All emphasis have been supplied).

The following is a pertinent part of Justice Jackson's opening statement:

> . . . [W]hat makes this inquest significant is that these prisoners represent sinister influences . . . that will work in the world long after their bodies have returned to dust . . . they took from the German people all those dignities and freedoms that we hold as our *natural and unalienable rights in every human being*. . . .Civilization can afford no compromise with the *social forces* which would gain renewed strength if we deal generously or indecisively with the man in whom those forces now precariously survive.

The case law of today certainly indicates we are on a similar ideological course accompanied by evidence of increasing moral decay.

With man's disposition to live selfishly he needs to be reminded of God's law and the consequences for disobedience. As part of his daily education, man needs to be reminded of the principles contained in our Declaration. The prominent display of the Ten Commandments is an adjunct to achieving that moral review.

Alexander Hamilton implied we needed the foundational principles established in the Declaration when he stated: "Why has government been instituted at all? Because the passions of man will not conform to the dictates of reason and justice without constraint. . . ."

CONCLUSION AND SOLUTION

The foundational principles of the Declaration of Independence have been violated by excluding the Ten Commandments from public display. The decision should not rest on historical evidence, or whether or not in the "opinion" of the Court they do or do not represent a secular purpose. Their display is authorized consistent with the foundational Philosophy of Government of the United States. The continued erosion of God and His moral principles from our society is creating a religion of atheism and its consequent secular humanism. Compliance is being required on order of the court with punishment resulting from violation of that order. It is not "religion" at issue; it is God's moral law. At stake is the moral survival of this nation. We are in the process of leaving a Legacy to a wonderful generation of young people coming down the trail. What will it be? Rev. Matthias Burnett in 1803 charged:

> Finally, ye . . . whose high prerogative it is to . . . invest with office and authority or to withhold them and in whose power it is to say or destroy your country, consider well the important trust . . . which God . . . [has]put into your hands. To God and posterity you are accountable for them. . . . Let not your children have reason to curse you for giving up those rights and frustrating those institutions which our fathers delivered to you.[40]

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40. Burnett, pp. 26-27.

On a suggested solution, please see the "Conclusion and Suggested Solution" in our Amici brief in McCreary on pp. 24, 25. It will require a change in paradigm but the "wall of separation between church and state" should be redefined as preventing the government from interfering with, or restraining, the freedom to express in public life our Philosophy of Government.

Respectfully submitted,

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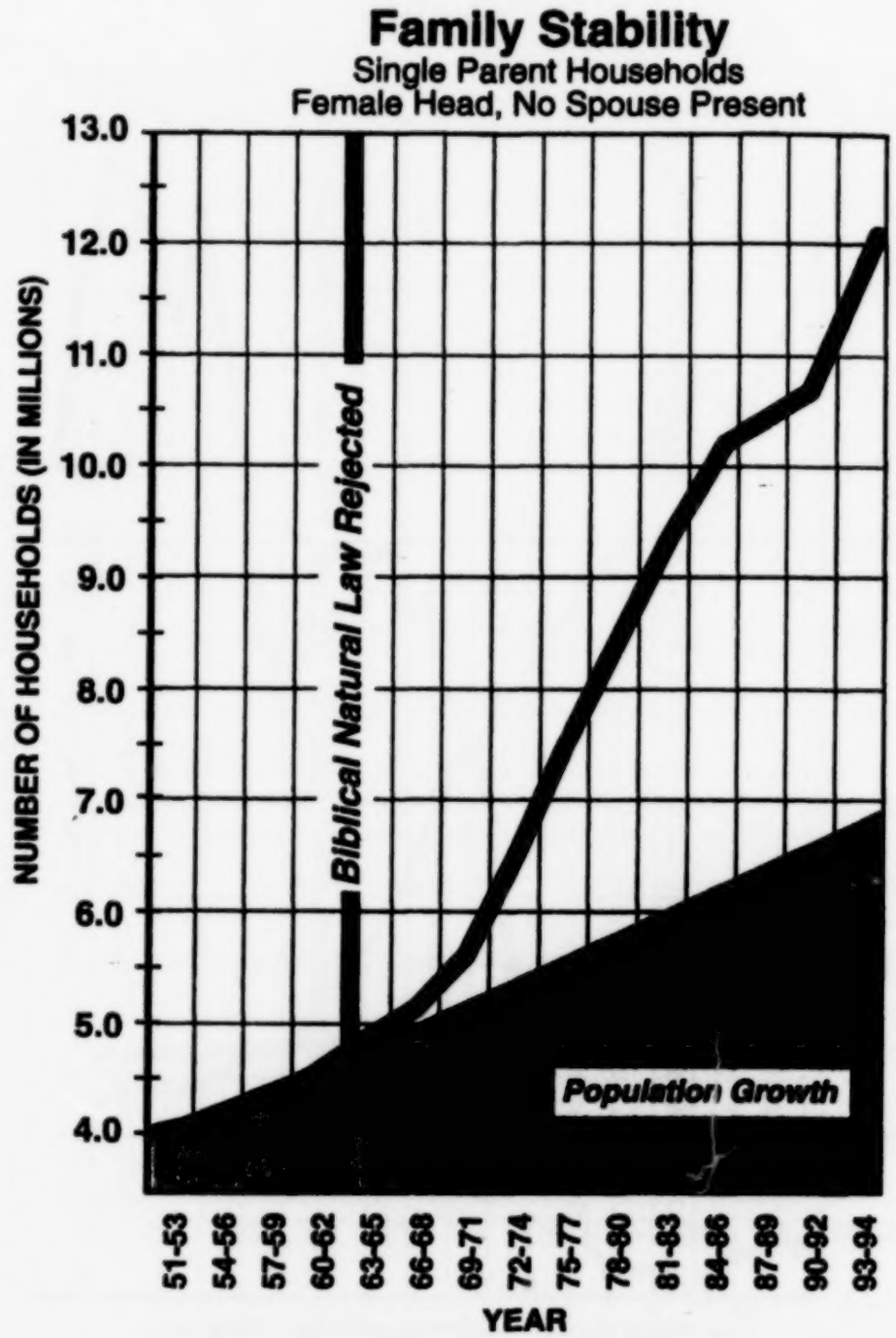
APPENDIX

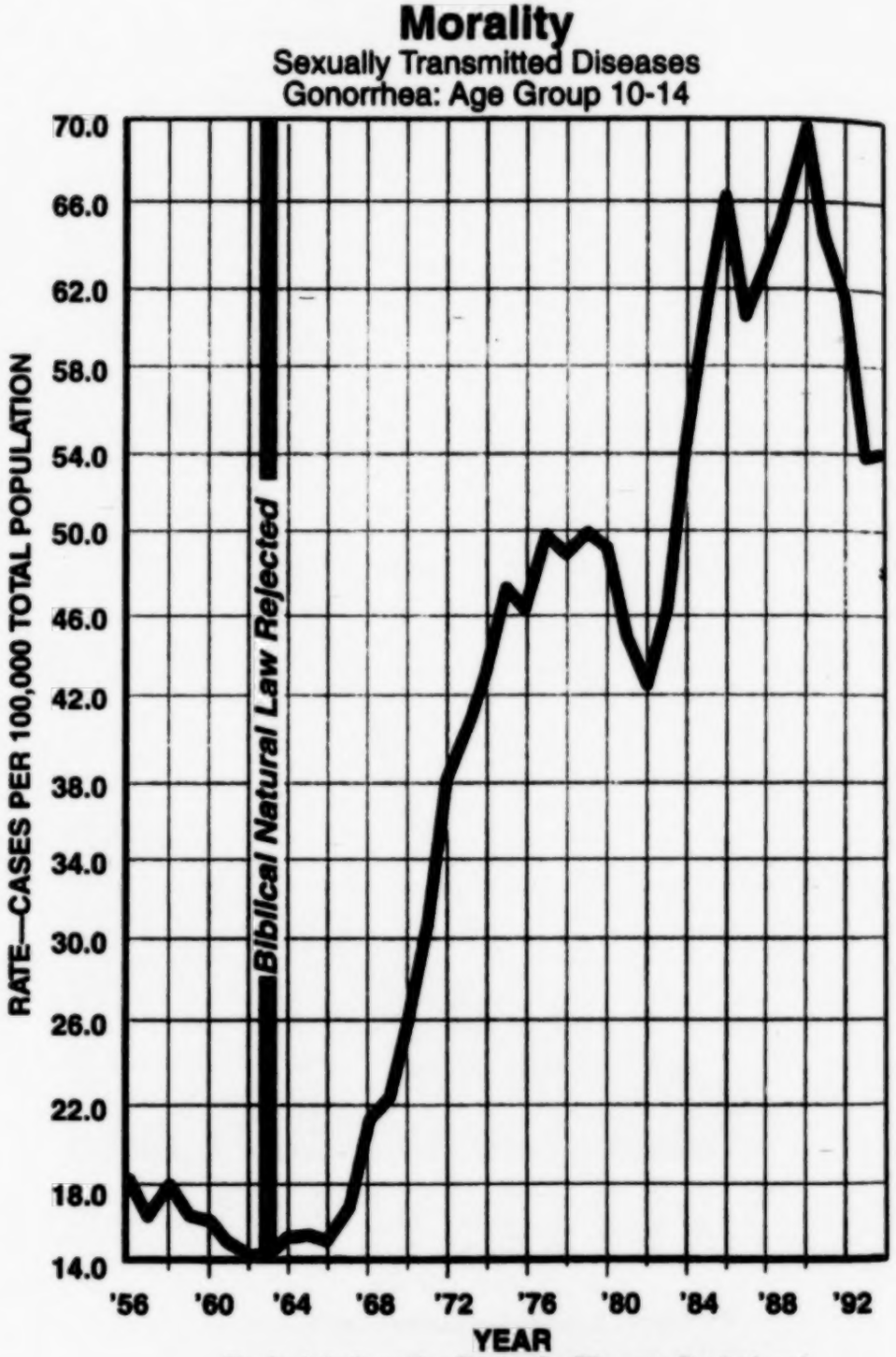
FAMILY STABILITY . . . FEMALE HEAD, NO SPOUSE PRESENT



Indicates population growth profile.

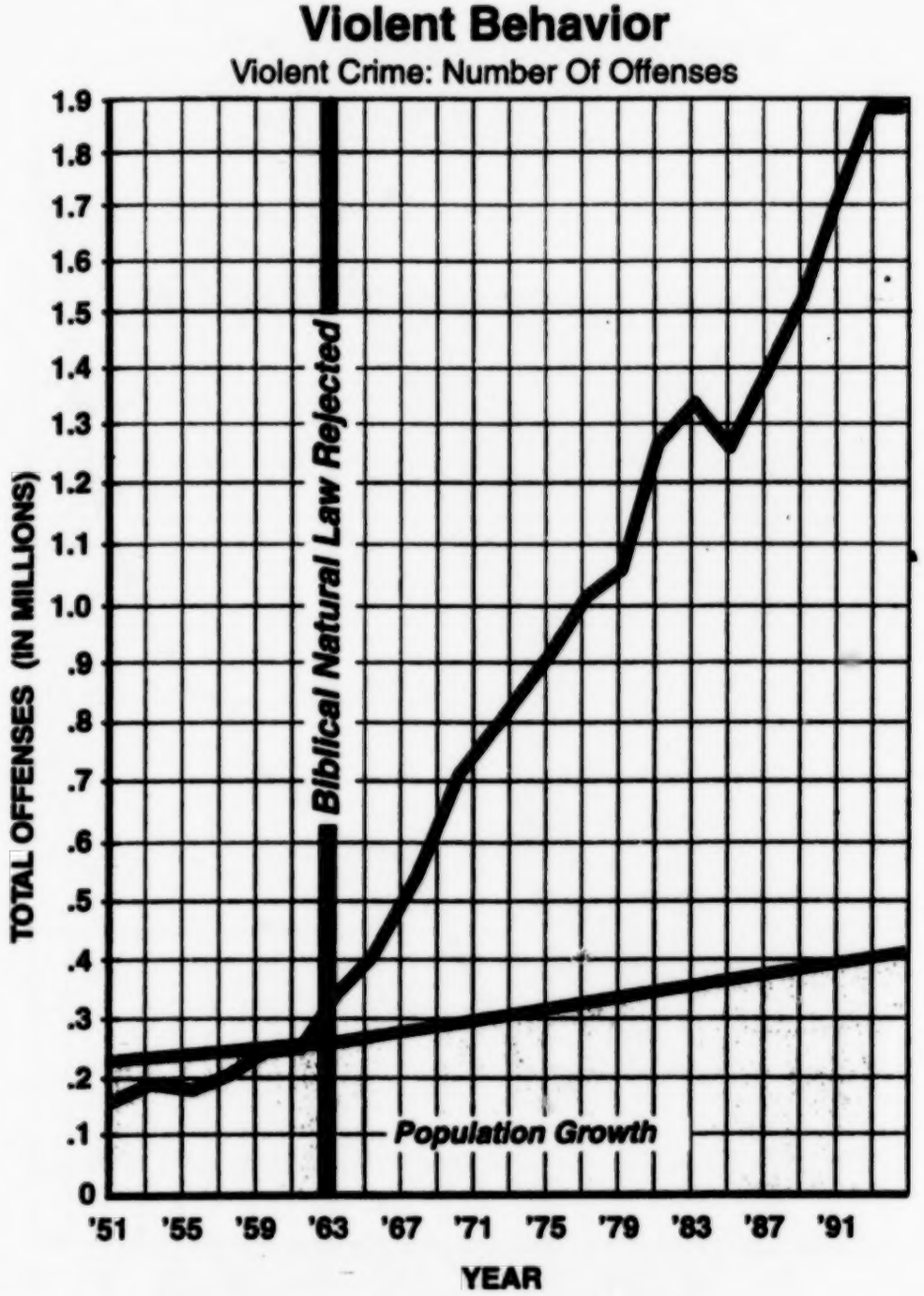
Basic data from *Statistical Abstract of the United States*, and the Department of Commerce, Census Bureau.

MORALITY . . . SEXUALLY TRANSMITTED DISEASES: AGE GROUP 10-14



Basic data from the Center for Disease Control and Department of Health and Human Resources.

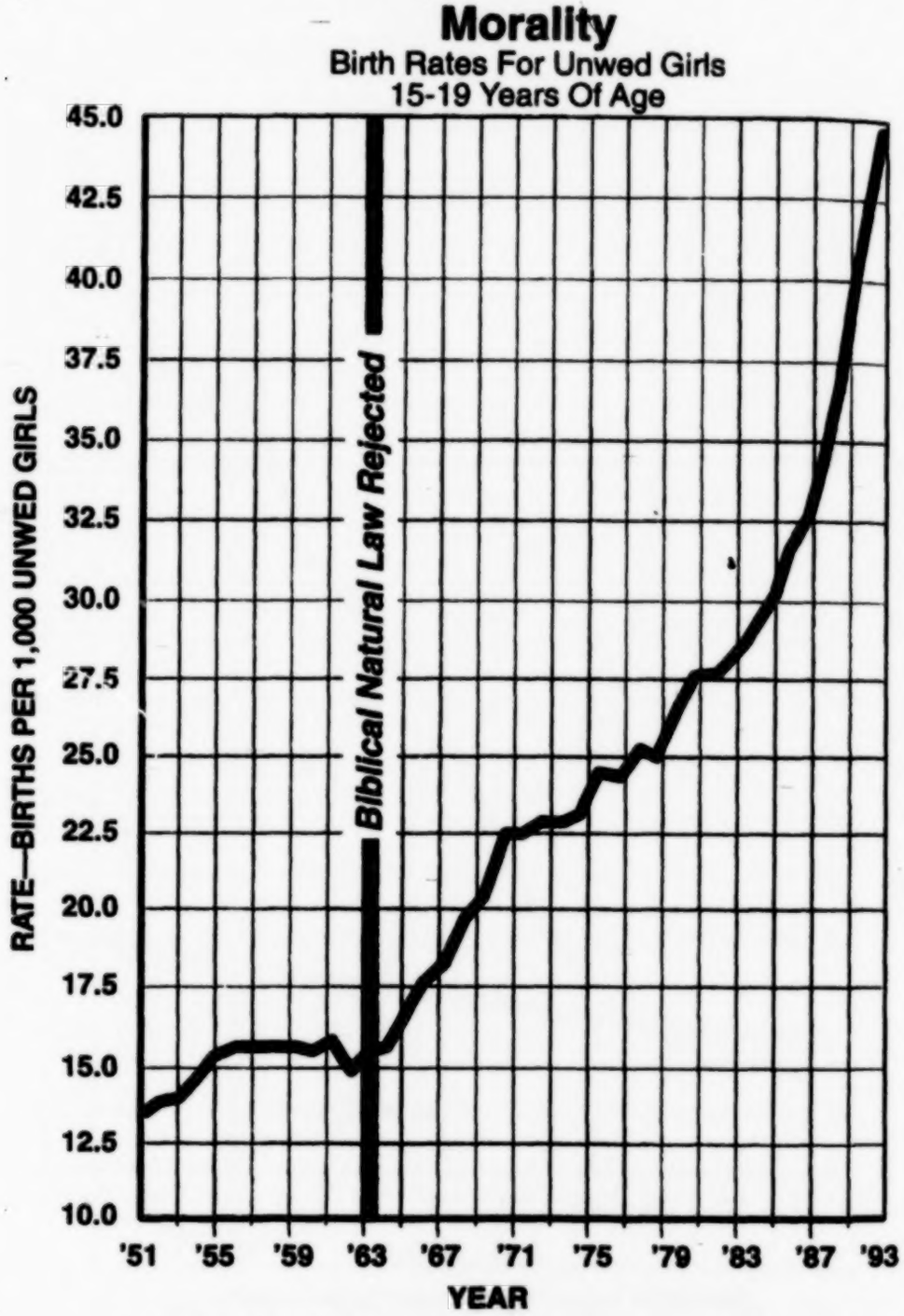
VIOLENT BEHAVIOR . . . NUMBER OF OFFENSES



Indicates population growth profile.

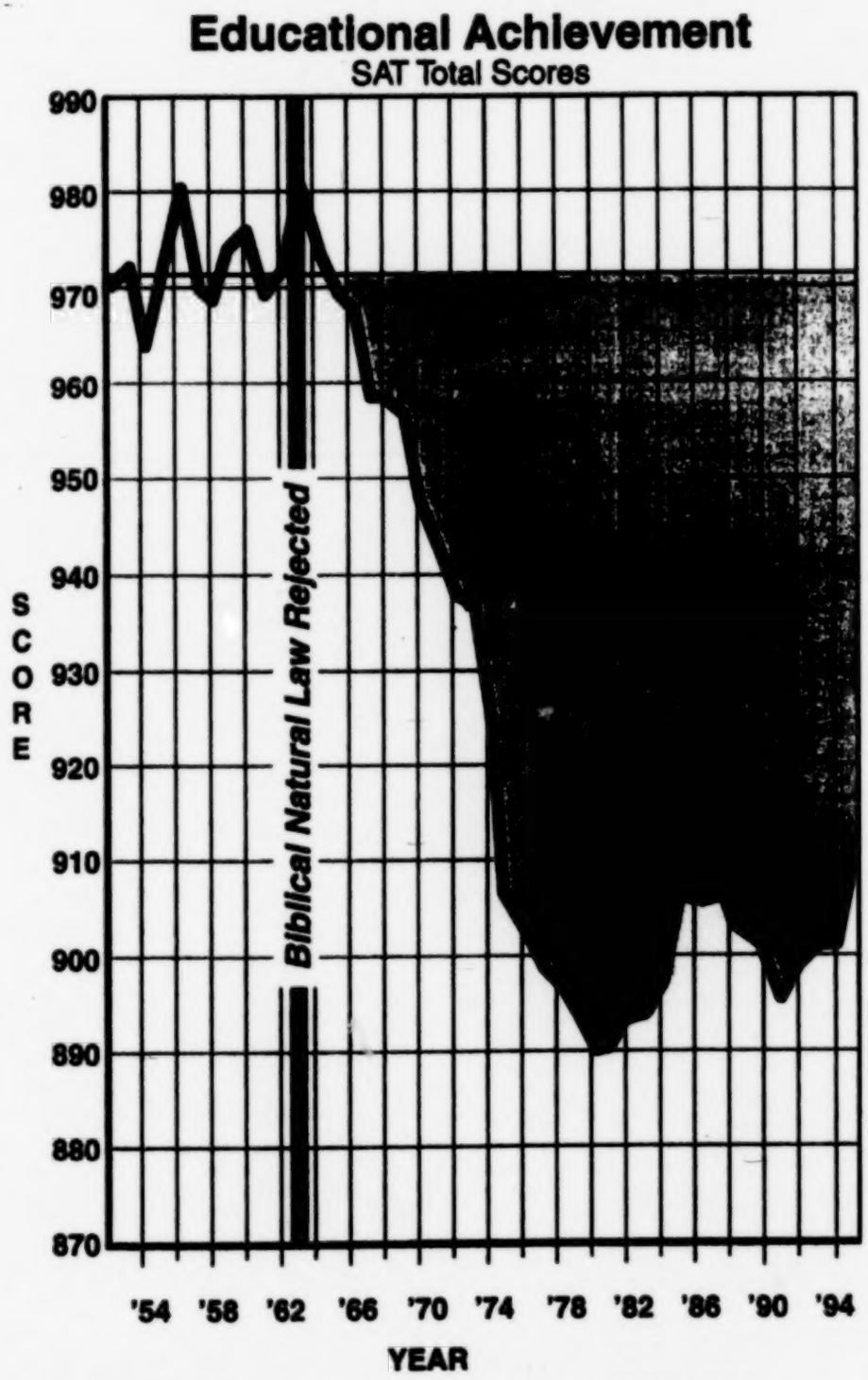
Basic data from *Statistical Abstract of the United States*, and the Department of Commerce, Census Bureau.

MORALITY . . . BIRTHRATES FOR UNWED GIRLS: 15-19 YEARS OF AGE



Basic data from Department of Health and Human Services and *Statistical Abstract of the United States.*

EDUCATIONAL ACHIEVEMENT . . . SAT TOTAL SCORES



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No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Focus on the Family is a California non-profit religious corporation committed to strengthening the family in the United States and abroad. Focus on the Family's interest in this case stems from its active involvement in the protection of free speech as well as the promotion of the freedom of religion. Focus on the Family actively opposes efforts to rid the "public square" of symbols and expressions of religious faith. Efforts by some to remove the Ten Commandments from public buildings, textbooks, and other facilities frequented by the public both deny the cultural and historical heritage of this country, and actively demean the religious beliefs of a substantial portion of the population. Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes Focus on the Family magazine and other literature that is received by more than 2 million households each month. Topics addressed in the daily radio broadcast and in printed literature published and distributed by Focus on the Family frequently concern religious expression, freedom of speech, and the right of individuals, privately, to express their opinions, whether religious or otherwise.

Family Research Council ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to affirm and promote the traditional family

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[1] This brief is filed with the consent of both parties. Petitioner filed a blanket consent for Amicus Curiae briefs with the Court. Respondent's letter of consent to this brief has been filed with the Court. Pursuant to Rule 37.6, no portion of this brief was authored by counsel for a party and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

and the Judeo-Christian principles upon which this country is built. FRC provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

Amici believe that the government may lawfully acknowledge the major role religious principles have served in forming our legal system and liberties. Specifically, the Ten Commandments monument displayed on the grounds of the Texas State government complex exemplifies lawful acknowledgment. *Amici* believe that banning such displays affirmatively denies the historical facts of our religious heritage as a nation.

SUMMARY OF THE ARGUMENT

This Court often and correctly relies on history in discerning the original meaning of the Establishment Clause. Unfortunately, in its first case interpreting that Clause, *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court relied on an inaccurate and incomplete view of the history surrounding the Establishment Clause's adoption.

Everson's historical analysis suffers from four essential flaws: (1) it neglected historical evidence critical to understanding the original intent behind the Establishment Clause; (2) it relied exclusively on Virginia's intrastate debate over state-established churches; (3) even worse, it myopically focused on one viewpoint within that debate that does not even support the Court's separationist interpretation of the Establishment Clause; and (4) it adopted a view of church-state relations that conflicts with the actions of early Congresses concerning religion. This Court's current Establishment Clause tests, the *Lemon* and endorsement tests, are based on *Everson*'s erroneous view of history, and should be abandoned.

This Court should adopt a coercion test in place of the *Lemon* and endorsement tests. The most relevant sources of

original intent regarding the Establishment Clause — the Congressional debates concerning the First Amendment and the state conventions considering ratification of the Constitution — support the adoption of this test. The coercion test outlaws coercion of religious orthodoxy or financial support by force of law or threat of penalty. The Ten Commandments display involved in this case easily passes the coercion test, and should be upheld.

ARGUMENT

This Court has often observed that the Establishment Clause must be interpreted in light of the historical understanding of that Clause. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the first Supreme Court decision interpreting the Establishment Clause, the Court relied almost exclusively on history in adopting Thomas Jefferson's "wall of separation" metaphor as the central meaning of the Clause. *Id.* at 8-15. Subsequent decisions have confirmed that history is fundamental to understanding what the Establishment Clause is meant to protect. *See, e.g., Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213-214 (1963); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984). As Justice Brennan said in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "[T]o give concrete meaning to the Establishment Clause 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Id.* at 642-43 (citation omitted) (Brennan, J., concurring).

These opinions demonstrate that history must guide this Court's interpretation of the Establishment Clause. Indeed, the key to understanding why the *Lemon* and endorsement tests must be abandoned and, more importantly, what new test should replace them, is apprehending the intent of the founders in adopting the Clause. Unfortunately, the history

relied on by the *Everson* Court in interpreting the Establishment Clause has pushed Establishment Clause jurisprudence well outside of historical bounds.

I. THE *LEMON* AND ENDORSEMENT TESTS SHOULD BE ABANDONED BECAUSE THEY ARE BASED ON AN ERRONEOUS VIEW OF HISTORY

The *Lemon* and endorsement tests are unmistakably based on the Supreme Court's decision in *Everson*. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court explicitly tied the first two prongs of *Lemon* to the Court's decision in *Everson*. *Schempp*, 374 U.S. at 222; *Allen*, 392 U.S. at 243; *see also Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (observing that the *Lemon* test is grounded in *Everson*'s historical analysis and decision) (Rehnquist, J., dissenting). *Everson* also provides the basis for the endorsement test, which is merely a "refinement of the *Lemon* test," *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring), not a new test with an independent historical justification.

It is well-known that *Everson* contains numerous and serious historical errors. *See id.* at 108 (noting that *Everson*'s wall concept suffers from many "historical deficiencies") (Rehnquist, J., dissenting).[2] In *Everson*, the

[2] The *Everson* Court's historical analysis has been roundly criticized by legal scholars. Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 Emory L.J. 223, 232 (2000) ("There is broad agreement among critics that the Court was attracted to a selective, erroneous version of history in order to buttress the Justices' ideological predilection for an absolute separation between church and state."). Robert L. Cord, denouncing the precedential value of *Everson*, said that "by omitting any historical facts that ran counter to

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Court relied on founding era history, especially that of Virginia, in adopting the metaphor of a "wall of separation between church and State." *Everson*, 330 U.S. at 16. The *Everson* Court's conclusion is historically unsupportable for at least four reasons: (A) the Court failed to review the most reliable sources of the founder's intent with regard to the Establishment Clause; (B) the Court violated the principle of federalism by relying on Virginia's debate concerning state establishments of religion; (C) even if Virginia's history is relevant, it does not support a strict separationist interpretation of the Establishment Clause; and (D) the Court adopted a version of church-state separation that cannot be reconciled with the actions of early Congresses. Because the *Lemon* and endorsement tests suffer from the "same historical deficiencies as the wall concept itself," *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting), they should be abandoned.

A. The *Everson* Court Neglected The Most Relevant Evidence Of The Establishment Clause's Meaning

There are three primary sources for determining the original meaning of the Establishment Clause: the Congressional debates concerning the Clause; the state

the impregnable wall [of separation] thesis, all the opinions in *Everson* display a fallacious history by omission that should no longer be allowed to pass for an adequate, scholarly, or even fair scrutiny in search of the establishment clause's prohibitions." Dreisbach, *supra* at 233 (quoting Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 Utah L. Rev. 895, 901 (1987)). Mark DeWolfe Howe argued that in *Everson* the Court "recounted American history 'not in order to tell accurately the story of the past, but in order to legitimate its own policy judgment.'" Dreisbach, *supra* at 232 (quoting Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 168 (1965)).

conventions considering ratification of the federal Constitution; and the practices of the several states concerning church establishment at the time of the founding. Of these three sources, the practices of the states are the least relevant because, at the founding, the establishment issue was distinctly different on the federal and state levels. As church-state historian Gerard Bradley observed,

> Equating . . . an intrastate contest . . . with federally imposed norms is fundamentally ill conceived. Most especially in the founding era, there should be no presumption that what the people thought an appropriate method of governing federal affairs corresponded to their notion of good state government—and vice versa.

Gerard V. Bradley, *Church-State Relationships in America* 12 (1987). The purpose of the Establishment Clause, *see infra*, § I.B., was to protect each state's unique policy concerning the establishment of religion from interference by the new federal government. A glaring problem with *Everson*, then, is that it relied almost exclusively on the struggle for religious liberty in Virginia to give context and meaning to the federal Establishment Clause, *Everson*, 330 U.S. at 11-13 (majority); *id.* at 33-41 (Rutledge, J., dissenting), and neglected the Congressional debates and state ratifying conventions.[3]

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[3] Bradley, *supra* at 12 (noting the importance of the Congressional debates and state ratifying conventions in interpreting the Establishment Clause); Paul G. Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 Ariz. L. Rev. 307, 318 (1973) ("It must be remembered that this was a constitutional amendment and that equal regard must be given not only to the views of others who participated in its drafting, but also to the understanding of the Congress which submitted the amendment to the states and to the understanding of the states which ratified it.").

The Congressional debates regarding the First Amendment contain important evidence of the founders' intent regarding the First Amendment. "[T]he task of the First Congress . . . was to assimilate the proposals submitted by the states together with what was thought to be politically satisfactory and in the best interests of both religion and the government." Chester James Antieau, et al., *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 207 (1964).[4] The views expressed by Representatives during the Congressional debates are vital to a proper interpretation of the Establishment Clause because they were affected by the proposals made by the state ratifying conventions for a federal constitutional provision protecting religious liberty.[5]

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[4] This illuminates another reason, in addition to those discussed in § I.B, *infra*, why the *Everson* Court's reliance on Virginia's religious liberty history, and the roles played by Madison and Jefferson in making that history, is misplaced. Of the two great protagonists for religious freedom in Virginia, only Madison was a member of the First Congress. Madison penned a first draft of the Establishment Clause, introduced that draft to the Congress, and debated the Clause on the floor. *See Creating the Bill of Rights: The Documentary Record from the First Federal Congress* xiv-xv (Helen E. Veit et. al. eds., 1991) [hereinafter Creating the Bill of Rights]. Madison's leading role in proposing the Establishment Clause and steering it through Congress entitles his comments in the context of the Congressional debates to significant weight in determining its meaning. *Id.* at xvi ("Madison has a greater claim to being known as the father of the Bill of Rights than of the Constitution. Without his commitment there would have been no federal Bill of Rights in 1791."). Jefferson, on the other hand, was not a member of the First Congress. Therefore, his views are far less relevant than Madison's in interpreting the constitutional meaning of the Establishment Clause.

[5] Antieau, et al., *supra* at 111 ("[T]he members of the First Congress under the Constitution of the United States certainly attempted to honor the wishes and demands of the states for additional safeguards of religious freedom through amendments. . . . [A]ny study of the First Amendment must include the state proposals.") (emphasis added).

Similarly, a review of the state ratifying conventions' intentions regarding the Establishment Clause is imperative to understanding its meaning.[6] Under our governmental system, the federal government is entirely a creature of the states. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839 (1995) ("A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it.") (Kennedy, J., concurring). The powers contained in the Constitution represent those surrendered by the states to the federal government. *Printz v. United States*, 521 U.S. 898, 919 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'") (citation omitted). After ratifying the Constitution, the states imposed limitations on the powers they gave to the federal government by ratifying the Bill of Rights which, of course, included the Establishment Clause. *Barron v. Baltimore*, 32 U.S. 243, 247-48 (1833). Because the Constitution is a product of the states, it should be construed consistent with what the states intended in ratifying the Constitution and the Bill of Rights. The states' intent is best discovered by reviewing the state ratifying conventions. James Madison himself advocated relying on the state ratifying conventions to determine the meaning of the Constitution.[7]

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[6] Bradley, *supra* at 12 (discussing the significance of the state ratification process in determining the meaning of the Establishment Clause).

[7] James Madison, *Letter to Henry Lee*, June 25, 1824, *in* Writings 803 (Jack N. Rakove ed., 1999) ("I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that not be the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers.") (emphasis added); *see also* Antieau, et al., *supra* at ix ("Madison stressed

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Because the *Everson* Court omitted both the Congressional debates and the state ratifying conventions from its historical analysis, it supplanted the historically intended "fence between good neighbors," *Lynch*, 465 U.S. at 673 ("[T]he Constitution [does not] require complete separation between church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."), with a Berlin wall.

B. The *Everson* Court Violated The Principle Of Federalism By Relying On Virginia's History In Interpreting The Establishment Clause

The principle of federalism played a pivotal role in the adoption of the Establishment Clause. At the time of ratification, each state had a unique approach to dealing with religious matters and they did not desire a uniform national standard concerning religious liberty.[8] As Madison put it

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that the meaning of the Constitution is to be found 'in the sense attached to it by the people in their respective State Conventions where it received all the authority which it possessed.'") (quoting James Madison, *Letter to Thomas Ritchie*, Sept. 15, 1821, *in* IX *Writings of James Madison* 71-72 (Gaillard Hunt, ed., 1900-1910)).

[8] Many scholars have concluded that the actual purpose of the Establishment Clause was to prevent the Congress from interfering with the diverse state approaches to religious freedom. Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 5, 15 (1982); Bradley, *supra* at 12; Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 46 (1990) (noting that a main purpose of the religion clauses was "to prevent congressional interference with existing state establishments"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.") (Thomas, J., concurring).

during the Congressional debates, if the word "national was inserted before religion . . . it would point the amendment directly to the object it was intended to prevent."[9] Indeed, without a guarantee of federal non-interference, states with religious establishments like New Hampshire, Vermont, and Maryland likely would not have ratified the First Amendment.[10] The states were not interested in adopting any one state's approach to religious liberty on the national level, but were interested in ensuring that they could pursue their policies regarding religion free from the interference of the national government.[11]

The *Everson* Court contravened the federalism principle

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[9] Creating the Bill of Rights, *supra* at 158. Thomas Jefferson echoed Madison's federalism argument regarding the Establishment Clause in a letter written in 1808:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the State, as far as it can be in any human authority.

Thomas Jefferson, *Letter to Rev. Samuel Miller*, Jan 23, 1808, *in* Writings 1186-87 (Merrill D. Peterson ed., 1984).

[10] Bradley, *supra* at 12.

[11] Cord, *supra* at 5 (noting that the Establishment Clause was designed "to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit"); *see also*, Joseph Story, *Commentaries on the Constitution of the United States* §992 (reprint 1987) (1833) (noting that the Establishment Clause left "the whole power over the subject of religion . . . exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions").

by giving James Madison's *Memorial and Remonstrance* and Thomas Jefferson's *Bill for Religious Liberty* — both products of the Virginia debate over religious freedom — virtually dispositive weight in construing the federal Establishment Clause. *Everson*, 330 U.S. at 14 (observing that the "provisions of the first amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [Religious Liberty] statute."); *id.* at 39 ("All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our [federal] constitutional tradition.") (Rutledge, J., dissenting). This misplaced reliance on Virginia history led to *Everson*'s historically incorrect assumption that the Establishment Clause's impact upon religious liberty is virtually identical to Virginia's choices regarding religious liberty.[12] In ratifying the Establishment Clause, the states intended to prevent the federal government from supplanting their approaches to religious affairs, not to adopt the "Virginia approach" on such matters.

C. Even If Virginia's History Is Relevant, It Does Not Support A Strict Separationist Interpretation of the Establishment Clause

Significantly, the views of Madison and Jefferson within the Virginia religious liberty debate do not even support a strict separation between church and state under the Establishment Clause. In the same year that Madison published his *Memorial and Remonstrance* (1785), he also introduced three bills in the Virginia Assembly dealing with

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[12] Kauper, *supra* at 318 ("There is no substantial evidence to indicate that the no-establishment phrasing [of the First Amendment] was generally understood to convey a meaning that could be equated with the Virginia Bill of Religious Liberty . . . .").

religious liberty: Jefferson's "Bill for Religious Liberty," "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," and "A Bill for Appointing Days of Public Fasting and Thanksgiving."[13] The Sabbath law, likely written by Jefferson,[14] prohibited work on Sunday and imposed a fine of ten schillings for each offense.[15] The fasting and thanksgiving law, also likely written by Jefferson, provided the following: "Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse."[16] Madison's sponsorship and Jefferson's likely authorship of these bills calls into serious question the *Everson* Court's fundamental holding that Madison and Jefferson were the fathers of the constitutional principle of strict separation between church and state.

Moreover, the *Everson* Court failed to recognize that Madison's and Jefferson's views were but one view among many in Virginia concerning church-state relations. Madison's *Remonstrance*, a petition against the Assessment Bill,[17] scarcely stood alone, and only one fifth of all the

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[13] Cord, *supra* at 220-21.

[14] Jefferson had been appointed to a committee to revise Virginia's laws in 1776. *Id.* at 216. While not definitively determined, "the most accepted theory seems to be that Jefferson was responsible for revising" the Sabbath Law. *Id.* at 216-17.

[15] *Id.* at 217.

[16] *Id.* (quoting Report of the Committee of Revisors Appointed by the General Assembly of Virginia in 1776 (Richmond: Printed by Dixon and Holt, 1784)).

[17] The Assessment Bill was the target of Madison's *Remonstrance*. In effect, the Bill would have placed "a clergyman on the government

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Virginians who signed their names to such petitions signed it.[18] Other influential petitions against the Bill were circulated. According to one historian, these other petitions hold "the key to understanding the nature of the religious settlement in Virginia."[19] While opposed to the assessment, they insisted that "liberty of conscience demanded that the state treat all religious groups equally."[20] Moreover, these same petitions expressed the need for government to "institutionalize certain Christian norms and values."[21] Baptist petitions, for instance, urged the Virginia legislature to "do 'its part in favour of Christianity' by 'supporting those Laws of Morality, which are necessary for Private and Public happiness.'"[22] Thus, the *Everson* Court's strict separationist interpretation of the Virginia debate over religious freedom is a selective and seriously skewed reading of Virginia history.

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payroll in his sacerdotal and ecclesiastical capacities" and would have funded "the system by direct coercion of individuals." Bradley, *supra* at 13.

[18] Thomas E. Buckley, S.J., *Church and State in Revolutionary Virginia, 1776-1787*, at 175 (1977).

[19] *Id.*

[20] *Id.* at 177.

[21] *Id.* at 182.

[22] *Id.* at 181 (quoting Religious Petitions, Cumberland County, Oct. 24, 1776, Nov. 12, 1784, Nov. 3, 1785 (unpublished Religious Petitions, 1774-1802, presented to the General Assembly of Virginia) (on file with the Virginia State Library, Richmond)).

D. The *Everson* Court Adopted A Version Of Church-State Separation That Conflicts With Conspicuously Pro-Religious Actions Taken By Early Congresses

The outgrowth of *Everson*'s strict separation doctrine, the *Lemon* and endorsement tests, require governments to have a secular purpose for actions concerning religion. If this is true, then the federal government has consistently violated the Establishment Clause.[23] The United States has passed laws with patent religious purposes,[24] taken actions to achieve obvious religious ends,[25] and entered into several international treaties that invoke the favor of divine

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[23] The "secular purpose" requirement also clashes with the fundamental reason that proponents of religious freedom, including Madison, sought disestablishment: to promote and expand the influence of religion in America. As Madison put it, "the policy of the Bill is adverse to the diffusion of the light of Christianity. . . . Instead of Levelling . . . every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error." James Madison, *Memorial and Remonstrance*, *in* Writings, *supra* at 34-35.

[24] The First Congress, for instance, reenacted the Northwest Ordinance of 1787, which provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Wallace*, 472 U.S. at 100 (quoting 1 Stat. 50, 52 n. (a) (1789)).

[25] The First Congress sanctioned legislative prayer at the same time they approved the draft of the First Amendment, which included the Establishment Clause, for submission to the states. *Marsh*, 463 U.S. at 790. As President, Thomas Jefferson negotiated and received Senate approval for a treaty with the Kaskaskia Indians which provided federal money "for the support of a priest of" the Catholic religion and for "the erection of a church." Antieau, et al., *supra* at 167 (quoting 2 Charles Kappler, *Indian Affair — Law and Treaties* 67 (1904)).

providence.[26] After analyzing the actions of the early Congresses regarding religion, one scholarly study concluded: "The practices of the times following ratification of the First Amendment attest that this generation accepted as normal the use of governmental funds to encourage religion and religious education. . . . [T]he Congress . . . was agreeable to using public funds to see that persons had ample opportunities for exposure to religion."[27]

The "secular purpose" prong is also out-of-step with this nation's religious heritage. The founding generation unequivocally acknowledged the religious underpinnings of this nation, and the need for robust faith among the citizenry. George Washington chose the occasion of his farewell to public life to address the importance of religion to American society:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

George Washington, *Farewell Address*, *in* 4 *Annals of Cong.*

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[26] *See, e.g.*, *The Definitive Treaty of Peace of 1783*, *in* 26 *Journals of the Continental Congress* 23 (Worthington C. Ford et al. eds., 1904-37) (beginning "In the name of the most holy and undivided trinity.") (the treaty was signed by John Jay, John Adams, and Benjamin Franklin); *United States Treaty with Morocco Upholding the Light-House at Cape Spartel, May 31, 1865*, 14 Stat. 679 ("In the name of the only God! There is no strength nor power but of God."); and *The Gadsen Purchase Treaty, December 30, 1853*, 10 Stat. 1031 ("IN THE NAME OF ALMIGHTY GOD").

[27] Antieau, et al., *supra* at 167.

2876 (1796). John Witherspoon, who taught James Madison at Princeton, advised that "to promote religion is the best and most effectual way of making a virtuous and regular people." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2196-97 (2003) (citing John Witherspoon, *Lectures on Moral Philosophy* 110 (Varnum Collins ed., 1912). More recently, Franklin D. Roosevelt observed that the American people "hold to the inspiration of the Old Testament and accept the Ten Commandments as the fundamental law of God." *Quoted in* Stephen L. Carter, *The Culture of Disbelief* 100 (1993). Dwight D. Eisenhower recognized "[w]ithout God there could be no American form of government, nor an American way of life." *Id.* Indeed, absent our Declaration of Independence and its reliance upon a Creator with greater authority than our government, we would have no Constitution to construe.

"If our history demonstrates anything, it demonstrates that the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001) (internal quotes omitted). Yet this is precisely the result produced by the *Lemon* and endorsement tests. Because they are based on a flawed view of the original understanding of the Establishment Clause, and because they produce absurd results that are inconsistent with this nation's religious history and heritage, the *Lemon* and endorsement tests should be abandoned.

II. THIS COURT SHOULD REPLACE THE *LEMON* TEST WITH A COERCION TEST

Setting aside *Lemon* and its sour progeny will neither open the door to theocracy nor encouragement to an American Taliban. Rather, the most relevant and reliable historical sources point to the correct safeguard against the

establishment of religion. These sources are the Congressional debates regarding the Establishment Clause and the state conventions considering ratification of the federal Constitution. *See supra*, § I.A. Each unmistakably points this Court toward the proper test for the Establishment Clause: coercion. *See Lee v. Weisman*, 505 U.S. 577, 641-44 (1992) (advocating adoption of a coercion test) (Scalia, J., dissenting).

A. The Most Historically Defensible Establishment Clause Test Is The Coercion Test

Because James Madison drafted, proposed, and guided the First Amendment through the First Congress, his statements concerning the Establishment Clause's meaning during the Congressional debates are entitled to significant weight. During those debates, Madison discussed the Establishment Clause's purpose, saying that "he apprehended the meaning of the words to be, that congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[28] Madison reiterated his understanding later in the debates. He said that he "believed that the people feared one sect might obtain pre-eminence, or two combine together and establish a religion to which they would compel others to conform."[29] As Edward S. Corwin concluded after reviewing the Congressional debates, according to Madison's words "'to establish' a religion was to give it a preferred status, a pre-eminence, carrying with it even the right to compel others to conform.'" Edward S. Corwin, *The Supreme Court as*

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[28] Creating the Bill of Rights, *supra* at 157 (emphasis added).

[29] *Id.* at 158 (emphasis added).

National School Board, 14 Law & Contemp. Probs. 3, 11 (1949) (emphasis added); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 937 (1986) (concluding from Madison's words that "compulsion is not just an element, it is the essence of establishment"); Antieau, et al., *supra* at 127 ("Madison himself may have desired and believed the people wanted an amendment which would simply prevent the national government from establishing '*a* national religion' which would 'compel men to worship God in any manner contrary to their consciences.'") (emphasis in original).

The declarations and amendments proposed by several state ratifying conventions support this interpretation of the Establishment Clause. Both the Rhode Island and North Carolina conventions adopted a "declaration of principles" that contained language identifying compulsion as a fundamental component of an establishment:

> That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and therefore all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others.

Antieau, et al., *supra* at 112 (quoting I The Debates in the Several State Conventions on the Adoption of the Federal Constitution — Together with the Journal of the Federal Constitution — Together with the Journal of the Federal Convention 334 (Jonathan Elliot, ed., Washington 1938) (emphasis added)). The Virginia ratifying convention proposed an amendment that contained virtually identical

language. See *id.* at 119.

Upon a comprehensive review of the available sources concerning the original intent of the Establishment Clause,[30] The Institute for Church-State Law at Georgetown University concluded:

> [The constitutional generation] sought to omit from the ambit of Federal Government any power to bring about the discriminatory consequences and specific abuses which could flow from an improper relationship of the churches and the government. The First Amendment was intended to prevent the birth of federal political persecution and financial prejudice on the basis of religion.

Antieau, et al., *supra* at 207 (emphasis added). The "specific abuses" and "political persecution" historically associated with establishments of religion were discussed by Justice Scalia in *Lee v. Weisman*, 505 U.S. 577 (1992): "Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities." *Id.* at 641 (citing Leonard Levy, *The Establishment Clause* 4 (1986)); *see also* McConnell, 44 Wm. & Mary L. Rev. at 2207-08 (noting that "the most salient aspect of the historical establishment" was "government control over religion").

As noted above, relying on a state's internal debate over state-established churches to determine the meaning of the

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[30] The sources considered in this review included, among many others: proposals for a religious freedom amendment made by the state conventions that ratified the Constitution; the statements of Senators and Representatives in the First Congress; and the practices of and laws passed by the early Congresses. *See* Antieau, et al., *supra* at 111-42, 159-88.

federal Establishment Clause is ill-advised. *See supra* § I.B. Yet it is worth noting that even Virginia's own history, which this Court repeatedly relies on in interpreting the Establishment Clause, supports the adoption of a coercion test. *See* McConnell, 27 Wm. & Mary L. Rev. at 937-39. Madison's *Memorial and Remonstrance* identified coercion as the essential flaw of the Virginia Assessment Bill. Madison began his *Remonstrance* by citing the general principle that religion "can only be directed by reason and conviction, not by force or violence." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* Writings, *supra* at 30 (emphasis added). This principle, Madison argued, is violated by government actions that "force a citizen to contribute" or to "conform" to an established church. *Id.* at 31 (emphasis added).[31] Similarly, Jefferson's Bill for Religious Liberty supports a coercion test. Jefferson's Bill attacks laws that attempt to influence religious belief through "punishments," "bur[d]ens," or "civil incapacitations," or that "force" or "compel" a citizen to contribute money to a religious establishment. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* Writings 346 (Merrill D. Peterson ed., 1984).[32] The historical evidence leaves no doubt: legal coercion is an essential aspect of a religious establishment.[33]

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[31] Madison also decried "compulsive support" for an established sect and "attempts to enforce [establishments] by legal sanction." James Madison, *Memorial and Remonstrance*, *in* Writings, *supra* at 31, 35 (emphasis added).

[32] Jefferson's Bill further stated: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ." Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* Writings, *supra* at 347 (emphasis added).

[33] That coercion is an element of an establishment of religion is not a novel idea to this Court. In *Cantwell v. Connecticut*, 310 U.S. 296

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B. The Coercion Test

In accordance with the history outlined above, this Court should adopt the coercion test discussed by Justice Scalia in *Lee v. Weisman*, 505 U.S. at 641-44 (Scalia, J., dissenting); *see also Newdow*, 124 S. Ct. at 2331-33 (discussing the coercion test and applying it to the Pledge of Allegiance) (Thomas, J., concurring). Justice Scalia, speaking for Chief Justice Rehnquist and Justices Thomas and White, stated the test succinctly: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee*, 505 U.S. at 640 (emphasis in original). *See also* McConnell, 27 Wm. & Mary L. Rev. at 933. This test should replace the *Lemon* and endorsement tests in cases involving government acknowledgement of religion and will complement the neutrality principle used in cases involving access by religious groups to government funding and services. It also will reaffirm the judiciary's role of deciding "cases" and "controversies." U.S. Const. art. III, § 2. To illustrate the contours of the coercion test, we apply it below to common Establishment Clause questions and the instant case.

1. The Coercion Test As Applied To Government Actions Acknowledging Religion

Applying the coercion test to government actions acknowledging religion, like prayer at a public event or the display of the Ten Commandments, would clarify the line between forbidden establishment and permissible accommodation. The test should be applied with an eye to

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(1940), the Supreme Court said that the Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." *Id.* at 303 (emphasis added).

acts thought constitutional by the First Congress. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (stressing that Acts "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of [the Constitution's] true meaning."). This Court used that approach in *Marsh v. Chambers*, 463 U.S. 783 (1983), when it upheld the practice of paid chaplains praying before the Nebraska Legislature based on the First Congress' practice of employing chaplains.

Generally, the coercion test would permit governmental displays acknowledging the religious history and practices of this nation and its people. Such displays are typically passive. They do not compel the onlooker to accept the religious belief or heritage being honored. Moreover, the coercion test knows no favorites: Ten Commandments monuments, Christmas and Hanukkah symbols, and displays recognizing the heritage and traditions of other religious groups, like the symbol of Aztec prophecy located on the floor of the Texas State Capitol Rotunda, *see Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003), would comport with the coercion test.

Replacing the *Lemon* and endorsement tests with a coercion test will not license the government to run amuck in matters pertaining to religion. The First Amendment already provides strong protection for the rights of conscience without the *Lemon* and endorsement tests. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students with a conscientious objection to saying the Pledge of Allegiance must be excused from a state law requirement to recite it in public school); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that licensed car owners who object to the state motto may not be forced to display that motto on their license plates). The coercion test does not undermine, but complements, the First Amendment's commitment to

protecting conscience by forbidding government acts that coerce religious orthodoxy or financial support for religion by force of law or threat of penalty.

In addition, whether a government act satisfies the coercion test will depend on the specific facts of the situation under review. Hence, as with the *Lemon* and endorsement tests, what may be constitutionally permissible in one context under the coercion test, may not be permissible in a different context. *See Lee*, 505 U.S. at 643 (noting that within public schools the students' legal duty to attend and the parents' legal right to control their child's education affect the coercion analysis) (Scalia, J., dissenting).

2. The Coercion Test As Applied To Access By Religious Groups To Government Funding And Services

The coercion test would bring clarity to cases challenging a government act that provides funding or services to religious groups for the benefit a broader community. In this context, the coercion test would work in conjunction with the neutrality principle expressed in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As Justice Thomas observed in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004), legal coercion is an obvious element of any law that supports "religion generally through taxation." *Id.* at 2332. This is not the end of the analysis, however, in the context of laws that provide services or funding to religion. The neutrality principle applied by this Court in *Widmar* and *Zelman* teaches that such laws, which, like many government acts, are to some degree "coercive," pass constitutional muster so long as they provide aid in a manner that "is neutral in all respects toward religion." *Zelman*, 536 U.S. at 653.

This Court should adjust its neutrality test so that it comports more closely to this nation's founding history, as

well. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist reviewed the evidence surrounding the adoption of the Establishment Clause and concluded that it was originally intended to forbid "preference among religious sects or denominations" but "did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." *Id.* at 106 (Rehnquist, J., dissenting). Under this adjusted neutrality test, government aid programs that favor one sect or religion over all others would violate the Establishment Clause; however, programs that provide services or funding to all religions equally would survive constitutional scrutiny.

3. The Coercion Test Reaffirms The Federal Judiciary's Constitutional Role Of Deciding "Cases" and "Controversies"

The expansive notion of "injury" arising from the *Lemon* and endorsement tests have turned the federal judiciary away from redressing concrete, particularized injuries. Now, federal judges act as prophylactic psychologists, sweeping "offensive" religious content from sight before an "eggshell atheist" plaintiff sees it. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (cross in city seal violates Establishment Clause); *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) (nativity scene on lawn of county building violates the Establishment Clause); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (legislative resolution directing state official to include Ten Commandments monument in a historical and cultural display on the grounds of state capitol violated Establishment Clause). The Constitution requires an actual case or controversy, not mere hurt feelings. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487 (1982).

In *Valley Forge*, this Court rejected the notion that mere

psychological offense satisfied the standing requirement in Establishment Clause lawsuits. The Court unequivocally held that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III." *Id.* at 485-86. Yet, despite *Valley Forge*, the *Lemon* and endorsement tests permit even the most *de minimis* "violation" of the Establishment Clause to come before a federal court.[34] The Fourth Circuit Court of Appeals' rule regarding standing in the Establishment Clause context exemplifies the problem: "The injury that gives standing to plaintiffs in [cases involving religious displays] is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state." *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (emphasis added). Adopting the coercion test would resolve the tension between *Valley Forge* and the *Lemon* and endorsement tests regarding standing. Under the coercion test, only plaintiffs that could demonstrate actual coercion would have standing to sue a government actor for violating the Establishment Clause.

This narrower approach to standing also comports with a

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[34] Two cases currently in the federal courts are salient examples of this problem. In *Newdow v. Bush*, the plaintiff seeks a declaration that prayers at presidential inaugurations violate the Establishment Clause. The plaintiff asserts that such prayers make him "feel like a second class citizen and a 'political outsider.'" *Newdow v. Bush*, No.1:04CV02208, p. 5, (D.D.C. filed Dec. 21, 2004). In *Staley v. Harris County*, the plaintiff seeks removal of a private memorial containing a Bible which is located on the grounds of a county courthouse. The plaintiff asserts that the memorial "offended" her and "sends a message to her and to non-Christians that they are not full members of the Houston political community." *Staley v. Harris County*, 332 F. Supp. 2d 1030, 1034 (S.D. Tex. 2004). The District Court Judge granted the relief the plaintiff requested in *Staley*. *Id.* at 1041.

reality of life in a free republic: exposure to ideas with which one disagrees. As this Court has noted innumerable times, the First Amendment expects that citizens will confront ideas they find uncomfortable or offensive. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Newdow*, 124 S. Ct. at 2327 ("[T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.") (O'Connor, J., concurring).

The government speaks often, and undoubtedly sends messages that offend listeners frequently. For instance, one can assume that the statue of Chief Justice Roger Taney, who wrote the deplorable *Dred Scott* decision, located on the grounds of the Maryland State House[35] may seriously offend an African-American onlooker. This legitimately aggrieved individual, however, has no legal recourse to get the offensive statue removed, and neither should a person who passes a Ten Commandments monument displayed on public property. Lack of judicial remedy does not silence these individuals' opposition; both can assert their views through the political process and at the polls. *See United States v. Richardson*, 418 U.S. 166, 179 (1974); *see also American Jewish Congress v. City of Chicago*, 827 F.2d 120, 132-33 (7th Cir. 1987) ("When the government expresses views in

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[35] The Annapolis Complex Collection, A Wealth of Maryland History, *Roger Brooke Taney*, at http://www.mdarchives.state.md.us/msa/speccol/sc1500/sc1545/e_catalog_2002/rinehart1545.html, last visited January 13, 2005.

public debates, all are as free as they were before; that these views may offend some and persuade others is a political rather than a constitutional problem.") (Easterbrook, J., dissenting).

III. THE TEN COMMANDMENTS MONUMENT CHALLENGED BELOW SURVIVES SCRUTINY UNDER THE COERCION TEST

Under the coercion test, plaintiffs must prove that they are compelled, by force of law or threat of penalty, to conform themselves to a religious orthodoxy prescribed by the State. The Ten Commandments display at issue in this case does not violate the coercion test. Unlike school prayer, which this Court views as coercive because students "are required by law to attend school," *Schempp*, 374 U.S. at 223, the Texas monument entails no compulsion. The display is entirely passive; no one is ordered to walk past it, pay homage to it, or participate in ceremonies around it. Neither does the display coerce or compel the passerby to conform to a certain belief system. Indeed, the display is "utterly devoid of legal compulsion." *Lee*, 505 U.S. at 643 (Scalia, J., dissenting). If graduation prayer does not violate the coercion test, as Justice Scalia found in *id.* at 642-44,[36] then the Texas monument at issue in this case certainly does not.

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[36] Justice Kennedy's "psychological" coercion test should not be adopted by this Court because it is "boundless, and boundlessly manipulable." *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). Even though Justice Kennedy rightly identified coercion as the key element of an Establishment Clause violation, the psychological aspect of his test renders it virtually indistinguishable from the *Lemon* and endorsement tests in application. The proposed "coercion" test is capable of more uniform application than the infinitely malleable "endorsement" or "psychological coercion" tests that treat "appearance" the same as substance.

The context of the Ten Commandments monument at issue in this case further demonstrates its lack of coercion. The monument is part of a display of seventeen monuments located on the grounds of the Texas State Capitol complex; the entire display is a registered historic landmark. *Van Orden*, 351 F.3d at 182. The variety of monuments placed at the Capitol shows that the State of Texas is not interested in forcing people to adopt or accept the Ten Commandments, but instead is interested in commemorating the people, ideas, and events central to Texas' identity. *Id.* at 180. Moreover, other statues, plaques, and seals located on the Texas State Capital grounds include religious messages and symbols. An inscription above the bench in the Supreme Court Building reads "Sicut Patribus, Sit Deus Nobis," which means "As God was to our fathers, may He also be to us." *Id.* at 176. A display on the floor of the Capitol Rotunda contains the Mexican Eagle and serpent, which "is a symbol of Aztec prophecy." *Id.* If the Establishment Clause requires the Ten Commandments monument on the Texas State Capitol grounds to be removed, then these other religious messages and symbols would have to be removed as well.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to adopt the coercion test to replace the *Lemon* and endorsement tests for deciding Establishment Clause cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief of *Amicus Curiae* Foundation for Moral Law, Inc. Suggesting Affirmance

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutionality of a monument containing the Ten Commandments and erected on Texas state property should be determined solely by the text of the Constitution.

2. Whether, according to the text of the Establishment Clause, a Ten Commandments monument on Texas state property is unconstitutional.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems. To those ends, the Foundation has directly assisted, or filed *amicus* briefs, in several cases concerning the public display of the Ten Commandments.

As it does in the related case *McCreary County, Ky v. ACLU of Ky.* (03-1693), the Foundation has an interest in this case because it believes that the public posting of the Ten Commandments represents an important way in which government can acknowledge the sovereignty of God and His influence (past and present) on this nation. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the displays of the Ten Commandments at issue violate the words of the Establishment Clause.

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[1] *Amicus curiae* Foundation for Moral Law, Inc. files this brief by consent of counsel for both Petitioner (letter filed with the Clerk of the Court granting blanket consent to any *amicus* briefs) and Respondents (letter of consent filed with this brief). Counsel for *amicus* authored this brief in its entirety. No person or entity—other than the Foundation, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The display of the Ten Commandments on public property does not violate the Establishment Clause of the First Amendment because such displays do not implicate the text thereof, particularly as it was historically defined by common understanding at the time of the Amendment's adoption. The Ten Commandments display on the Capitol grounds in Texas is therefore constitutionally unobjectionable.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case tests that bear no resemblance to or take the focus away from the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and once again to embrace the plain and original text of the Constitution to guide its Establishment Clause jurisprudence.

The text of the Establishment Clause states that "Congress shall make no *law* respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the Ten Commandments display at issue, it becomes evident that the display is not a law, it does not dictate religion, and it does not represent a form of an establishment. Thus, a textual analysis demonstrates that the display of the Ten Commandments on the grounds of the Texas State Capitol is not prohibited by the Establishment Clause.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE TEXAS STATE CAPITOL TEN COMMANDMENTS MONUMENT SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE CONSTITUTION, NOT JUDICIALLY FABRICATED TESTS.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's often conflicting and always perplexing Establishment Clause precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. It is time for this esteemed Court to return to the bright-line "test" that is the very words of the First Amendment of the United States Constitution.

A. Judges are sworn to uphold the written constitutional text.

Our constitutional paradigm dictates that *the Constitution itself* and all federal laws are the "supreme Law of the Land." U.S. Const. art. VI. All judicial officers—from inferior courts to this Court—take their oath of office to support *the Constitution itself* (and no person, office, or government body). *Id. Amicus* respectfully submits that this Constitution and its oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of this Supreme Court.

Chief Justice John Marshall, writing for this Court, observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the very purpose of a "*written*" constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. *See*

Marbury, 5 U.S. at 176-80. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Id.* at 179-80. James Madison, the "father" of the Constitution, concurred in this view, stating that, "As a guide in expounding and applying the provisions of the Constitution . . . .the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, III *Letters and Other Writings of James Madison* 228 (Philip R. Fendall ed. 1865). This Court once believed that

> [i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."

Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).

B. The words of the First Amendment have been rejected in favor of *ad hoc* judicial gerrymandering.

Today, instead of applying, or at most explaining, the words of the First Amendment, this Court has led the federal judiciary to reject the very instrument judges are sworn to uphold: "[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984). Left with no fixed rules, the Fifth Circuit below attempted to draw the "line" in this case and, at the expense of the actual words of the Establishment Clause, evaluated the Texas Capitol monument of the Ten Commandments according to the *Lemon* test[2] and the endorsement test. Indeed, the Fifth Circuit, although it first

[2] *Lemon v. Kurtzman*, 403 U.S. 603, 612-13 (1971).

quoted the text of the Establishment Clause, identified the *Lemon* test rather than the words of the Constitution as the "required starting point in deciding contentions that state displays of symbols and writings with a religious message are contrary to the First Amendment." *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003). As the *Lemon* test was its starting point, the endorsement test was the court's finish line, and the text of the First Amendment was never considered anywhere in between. *See id.* at 177-82.

Amicus is hardly making a novel point when it suggests that the alternatives the Court has crafted in the place of the text of the First Amendment have been weighed in the balance and been found wanting. Recently, the Sixth Circuit noted in *ACLU of Kentucky v. McCreary County, Kentucky*, 354 F. 3d 438, 445 (6th Cir. 2003), the unofficial companion to the instant case, that several "individual Supreme Court justices have expressed reservations regarding the test set forth in [*Lemon*] for determining whether a particular government action violates the Establishment Clause." Other circuits throughout the country have expressed similar frustration with current Establishment Clause jurisprudence.[3]

[3] For example, the Third Circuit Court of Appeals has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000); the Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); and the Tenth Circuit opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

The confusion surrounding this area of the law has, not surprisingly, yielded a myriad of results throughout the country concerning public religious displays. Just in recent cases involving the public display or portrayal of the Ten Commandments, the Third (twice), Fifth, and Tenth (twice) Circuits have upheld such displays as constitutional. *See Modrovich v. Allegheny County, Pa.*, 385 F.3d 397 (3rd Cir. 2004); *Freethought Soc'y v. Chester County*, 334 F.3d 247 (3rd Cir. 2003); *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003); *Anderson v. Salt Lake Counties Corp.*, 475 F.2d 29 (10th Cir. 2002); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). On the other hand, in the Sixth (thrice), Seventh (twice), and Eighth Circuits Ten Commandments displays were held unconstitutional. *See ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004); *ACLU of Ky. v. McCreary County, Ky.*, 354 F. 3d 438, 445 (6th Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001); *Books v. City of Elkhart, Ind.*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *ACLU Nebraska Foundation v. City of Plattsmouth, Neb.*, 358 F.3d 1020 (8th Cir. 2004), *vacated pending reh'g*. And the Eleventh Circuit, *in the same year*, upheld one portrayal of the Ten Commandments in Georgia and struck down another in Alabama. *See King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).[4]

This confusion and criticism is inevitable. When the policy of this Court is to eschew a "fixed *per se* rule," predictability in decision-making—a hallmark of true law—is also jettisoned. The Court has abandoned a First Amendment jurisprudence

[4] *Amicus* will spare this Court citation to the various (and varying) United States district court cases concerning public displays of the Ten Commandments.

that enjoys an "evenhanded, predictable, and consistent development of legal principles, [that would] foster[] reliance on judicial decisions." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991); *see, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867-68 (1992). Moreover, the jurisprudential experiments with various extra-textual "tests" have produced a continuum of disparate results, often because of an attempt to achieve "neutrality" concerning religion. *See e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the community'"). But in so doing, this Court has strayed from the foundational principles of our constitutional system.

If the federal judiciary's creativity in applying fabricated Establishment Clause tests were transposed to another area of the law, the results would be equally unpredictable and arbitrary.

Imagine if a city decided to enforce speed limits like the federal judiciary now enforces the Establishment Clause. The text of the speed limit in "City" may clearly read "55 MPH," but as the Fifth Circuit might say, the *text* is not the true "required starting point" for determining whether a driver is speeding. *Cf. Van Orden*, 351 F.3d at 177. So it happens that a police officer in City pulls over a car driven by the mayor ("Mayor") and tickets the latter for speeding. At his subsequent appearance before the city judge, Mayor insists he was only traveling at 54 m.p.h. and the speed limit was clearly posted as 55 m.p.h. Judge, however, dismisses such an assertion as "antiquated" and "too literal" and insists that he cannot ascertain the definitions of either "speed," "limit," or

"55 miles per hour."[5] Instead, Judge explains, he will first apply a three-part test to determine whether Mayor was, indeed, breaking the speed limit:

(1) Purpose: whether Mayor was driving with the purpose of speeding;

(2) Effect: whether Mayor's travel had the primary effect of advancing or inhibiting speeding; and

(3) Entanglement: whether Mayor's travel fostered excessive entanglement between those who speed and city government.[6]

Mayor, seeing that an appeal to the law would be futile, argues that (1) his purpose was to obey the speed limit, and that regardless of his purpose, he was not driving at a speed greater than the limit of 55 m.p.h.; (2) he has no idea what effect his driving had on others' speed, but that at least driving under 55 m.p.h. would set a good example of not speeding; and (3) by obeying the speed limit as posted he was not fostering entanglement with those who speed and city government, but more likely lowering its probability.

Not to be outdone, Judge responds that (1) he thinks Mayor's proposed purpose is a sham, and that he really intended to speed, which is enough to violate the speeding laws;[7] (2) by simply traveling on a highway at speeds faster than other drivers (say, those traveling at 40 m.p.h. or those on the side of the road) the Mayor's driving would have the effect or appearance of speeding, or at least the promotion of

[5] *See Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1312-14 (M.D. Ala. 2002) (refusing to define "religion" under the First Amendment).

[6] *See Lemon*, 403 U.S. at 612-13.

[7] *See Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

speeding;[8] and (3) by driving in his government car and on government-maintained highways, the Mayor fosters entanglement between his "illegal" driving and government services and personnel.[9] Any way he looks at it, Judge can find that Mayor was speeding.

But Judge is not finished. Even if Mayor withstands his three-part test, Judge can also consider whether Mayor's driving endorsed or promoted speeding.[10] A "reasonable person," explains Judge, observing the Mayor traveling at a faster speed than other drivers (or than those on the side of the road) would clearly perceive that Mayor was speeding. Based on that "objective standard," the reasonable observer would feel that Mayor favored speeders over non-speeders, making them feel like "outsiders" in the travel community. Whether Mayor was actually going faster than 55 m.p.h., Judge explains, is not as important as whether Mayor's driving makes observers and other drivers *feel* that Mayor is speeding.[11]

Additionally, Judge continues, he might consider whether Mayor's driving psychologically coerces slow drivers to travel at Mayor's speed.[12] Whether Mayor is actually speeding is irrelevant, as is whether he is in any way actually forcing other drivers to match his speed. If other drivers would feel awkward or left out seeing Mayor pass them on the highway—

[8] *See Selman v. Cobb County Sch. Dist.*, No. Civ.A.1:02-CV-2325-C (N.D. Ga. Jan. 13, 2005) (holding that textbook sticker describing evolution as a "theory, not a fact" has effect of advancing religion).

[9] *See Glassroth*, 229 F. Supp. 2d at 1304 n.2.

[10] *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[11] *See Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003).

[12] *See Lee v. Weisman*, 505 U.S. 577 (1992).

particularly young, impressionable drivers—Mayor is guilty of speeding.[13] Such coercive traveling is impermissible.

At this point, Judge winks and suggests that he could let Mayor go if Mayor could prove that his driving was no faster than the driving speed of the legislators who established the first speed limit back in 1909. But Judge and Mayor both knew that the 1909 legislators were not traveling (and could not travel) at 54 m.p.h. With this "historical practice" exception clearly out of Mayor's reach, Judge notes that, in any event, he had let someone go with that excuse only once,[14] and he would not let it happen again.

Judge instructs Mayor that the best thing for him to do is probably to travel at about 5 m.p.h. from now on, or maybe even to just stay away from driving altogether: after all, the rule of law must be upheld or else citizens will lose faith in the speeding laws.

C. Textual infidelity has papered over America's history and constitutional government that *embraces* acknowledgments of God and public expressions of religion.

This Court's creativity in interpreting the Establishment Clause was clearly illustrated in *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203 (1963), in which the Court claimed that "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment." *Id.* at 226. The Court wove together truth and error in this passage in an effort to make its distortions of the First Amendment sound intellectually palatable. It is

[13] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

[14] *See Marsh v. Chambers*, 463 U.S. 783 (1983).

manifestly true that "the words of the First Amendment" "clearly and concisely state[]" the rule of decision in cases involving these issues; but, it is categorically false that these cases require "interpretation of a delicate sort" that yields the kind of extra-constitutional tests which have plagued this area of law for so long. It is likewise erroneous that neutrality is the polestar of the First Amendment's Religion Clauses.

Our United States was never intended to be "neutral" on the issue of God. The Pilgrims landing at Plymouth Rock in 1620 each signed the *Mayflower Compact*, which declared that they had "undertaken for the Glory of God and Advancement of the Christian Faith, and the Honour of our King and Country, a voyage to plant the first colony in the northern Parts of Virginia . . . " *Our Nation's Archive: The History of the United States in Documents* 46 (Bruun & Crosby eds. 1999). In the *Fundamental Orders of Connecticut* of 1639, the first permanent governing document of that colony and a forerunner of several colonial constitutions, the people stated that they desired "an orderly and decent Government established according to God, to order and dispose of the affairs of the people at all seasons as occasion shall require." *Colonial Origins of the American Revolution: A Documentary History* 211 (Donald S. Lutz ed. 1998).

The prominence of God in our nation's development continued during and after the American Revolution. God is referenced four times in the Declaration of Independence: He is called our "Creator" Who "endowed" us with "certain unalienable rights"; "Nature's God" Who instituted the "Laws of Nature"; the "Supreme Judge of the world"; and the One on Whom the Founding Fathers called upon for "the protection of divine Providence," as they pledged their lives, fortunes, and "*sacred* Honor" to the cause of independence. *See Declaration of Independence* (U.S. 1776) (emphasis added). Demonstrating that these references were not mere rhetorical

flourish, the Continental Congress, on November 1, 1777, declared a day of national thanksgiving even in the midst of the war for independence because they believed "it is the indispensable Duty of all Men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for benefits received, and to implore such further Blessings as they stand in Need of." *First National Proclamation of Thanksgiving*, *reprinted in* William J. Federer, *America's God and Country* 147 (1994). James Madison stated in *Federalist No. 37* that he believed that those who had participated in the Constitutional Convention of 1787 had "surmounted with an unanimity almost unprecedented" "so many difficulties" that "[i]t is impossible, for the man of pious reflection, not to perceive in it a finger of that Almighty Hand, which has been so frequently and signally extended to our relief in the critical stages of the revolution." J. Madison, *The Federalist No. 37* 185 (George W. Carey & James McClellan eds. 2001).

Not only was the nation at its founding not neutral toward God, but also, as this Court noted in *Schempp*, 374 U.S. at 213, "religion has been closely identified with our history and government." The Declaration's primary author, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX, (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered like the Declaration of Independence to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government."

Northwest Ordinance of 1789, Article III, *reprinted in America's God and Country*, at 484.

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854).

The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

S. Rep. No. 32-376 (1853).

As late as 1954 when Congress placed the words "under God" in the Pledge of Allegiance, President Dwight Eisenhower explained that such had been done to "reaffirm[] the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war." Speech of June 14, 1954, *reprinted in* William J. Federer, *Treasury of Presidential Quotations* 313-14 (2004).

These quotes from important figures throughout the history of the United States illustrate what this Court affirmed in

Schempp: "[T]hat the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." 374 U.S. at 213. Thus, the Constitution was not intended to require, nor until relatively recently was it interpreted to require, that God must be devalued in the public square in an attempt to achieve "neutrality" which supposedly prevents the possibility of some passerby suffering offense at the mention of God.

D. This Court should return to the fixed rule of the constitutional text.

Despite the obvious intention of the Constitution, made manifestly plain by the text of the First Amendment, this Court has elected to stray from text and instead has formulated tests, *e.g.*, *Lemon*, "endorsement," "coercion," in the name of a kind of "neutrality" toward religion that is historically inaccurate and practically impossible to achieve. When the Court does this, it steps outside its proper role as an interpreter of the *text* and lays aside judicial robes in exchange for legislative pens, which is exactly what the Constitution, and the Establishment Clause in particular, is supposed to prevent.

Chief Justice Marshall asked in *Marbury*, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?" 5 U.S. at 180. One dissenter in the infamous case of *Dred Scott* chastised the errant majority for not only rejecting the fundamental worth of a person, but the fundamental principles of constitutional interpretation. This Court would do well to consider Justice Benjamin Curtis's 148-year-old but still-relevant warning:

> And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

Dred Scott v. Sandford, 60 U.S. 393, 620-621 (1856) (Curtis, J., dissenting).

For too long, the "strict interpretation of the Constitution" has been abandoned, and "fixed rules" no longer govern Establishment Clause cases. This Court ought to decide this case according to the plain, and still unsullied, text of the First Amendment's Establishment Clause. *See Marbury*, 5 U.S. at 180.

II. THE TEXAS CAPITOL TEN COMMANDMENTS MONUMENT IS NOT UNCONSTITUTIONAL BECAUSE IT IS NOT A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend I. Whether the Ten Commandments were displayed alone or surrounded by a diverse context of other monuments, in no way could Texas's act of erecting the Ten Commandments be a "law respecting an establishment of religion."[15]

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[15] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not

A. Neither the monument, nor the state's action in relation to the monument, is a "law."

The Establishment Clause on its face restricts "laws," and this Court has recognized that the Clause was designed to restrict the exercise of "legislative power." *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). In "religious display" cases, however, this Court has, in effect, expanded its own power by unconstitutionally amending the Establishment Clause, ruling that the Clause may be violated either by a "statute or practice." *See Allegheny*, 492 U.S. at 592. Contrary to *Lemon*'s claim that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that this Court, therefore, "must draw lines" delineating what is constitutionally permissible, the text of the Establishment Clause contains a definite, straightforward meaning. *Lemon*, 403 U.S. at 612.

In its analysis of this case, the Fifth Circuit, although it arrived at the correct result, incorrectly assumed that the actions of the state in erecting or maintaining the Ten Commandments monument on the Capitol grounds amounted to a "law." However, not every action taken by a state under its constitutional and statutory authority constitutes a law.

At the time of the ratification of the First Amendment, Sir William Blackstone had defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Noah Webster's 1828 Dictionary states that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*,

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be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised herein.

restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original).

By erecting the Capitol Ten Commandments monument, Texas has made no law commanding any action from its citizens or restraining them from any action or conduct that they wish to pursue. The monument was erected by a simple 1961 resolution fueled by a desire to "'honor the youth of Texas who are members of the By Scouts.'" *Van Orden*, 351 F.3d at 179. Texas has neither acted upon nor implied any intent to command its citizens to perform any action or to prohibit any conduct by means of the Capitol monument. The Ten Commandments monument is simply a granite display on state property, not a law under the First Amendment.

Similar to an executive Thanksgiving proclamation, the Capitol monument "has not the force of law, nor was it so intended." *Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) ("The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. . . . It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor"). At most, it could be argued that the Texas monument serves as a *reminder* to citizens of certain standards of conduct. Thus, because the Texas Ten Commandments monument is not a "law," Texas has not violated the Establishment Clause.

B. The Texas Capitol monument does not "respect[] an establishment of religion."

The Ten Commandments monument at issue does not violate the Establishment Clause because it does not "respect," *i.e.*, concern or relate to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added.)

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and was embraced by this Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[16] "Religion" was defined as: "The duty which we owe to our Creator, and the manner of discharging it." Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, this Court considered and rejected the argument that the First Amendment definition of religion included the practice of polygamy. In arriving at its conclusion, the Court applied the definition of "religion" contained in the Virginia Constitution as controlling the meaning of that term in the First Amendment. *Reynolds*, 98 U.S. at 163-66. It thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, "within the legitimate scope of the power of . . . civil government." *Id.*

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[16] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

In *Beason*, the Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion."

> The term "religion" has *reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will*. . . . The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience . . . .

133 U.S. at 342 (emphasis added).

In *Macintosh*, this Court's decision resulted in the denial of the respondent's application for citizenship by naturalization because the respondent refused to take an oath to bear arms in defense of the United States on the ground that he would have to believe the war in question was morally justified before he would take such action. 283 U.S. at 613-14, 618.[17] Chief Justice Hughes dissented in *Macintosh*, believing that the respondent's refusal to take the oath based on religious principle ought not disqualify him from citizenship. In part, Chief Justice Hughes reasoned:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, . . . : "The term 'religion' has reference to one's

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[17] The *Macintosh* decision was later overturned by this Court in *Girouard v. United States*, 328 U.S. 61 (1946).

> views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

Macintosh, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Thus, Chief Justice Hughes's dissent in *Macintosh* was rooted in the historic constitutional definition of religion, a definition that presupposes God.

Sixteen years later in *Everson*, this Court noted that it had "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom]." *Everson*, 330 U.S. at 13. The "Virginia statute" explicitly founded its declaration of religious freedom on the basis that "Almighty God hath created the mind free" and that "all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy Author of our religion . . . ." Virginia Act for Establishing Religious Freedom (1785), *reprinted in* 5 *The Founder's Constitution* 84 (Kurland and Lerner eds., U. Chi. Press: 1987).

The *Everson* Court also emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id.* at 12. Indeed, Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution.

For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64.

Thus, this Court has recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16; *see also*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship"). Assuming, *arguendo*, that Texas's act of erecting the Capitol Ten Commandments monument is in some sense a "law," such an act cannot be considered a law concerning "religion" because, while the Ten Commandments themselves address duties owed to the Creator, they do not address the *manner* of discharging those duties. For example, the commandment to "honor thy father and thy mother" does not dictate how this command is to be fulfilled; indeed, different religions and sects (*i.e.*, Protestantism, Catholicism, Judaism, Islam, etc.) detail different ways in which to fulfill this commandment. Something that constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do), but also *how* those commands and prohibitions are to be carried out. The Ten Commandments, by themselves, do not do both of these and hence cannot be considered a "religion" under the constitutional definition of the term.

Noticeably absent from this definition is *any* implication that age or context plays a factor in whether a particular practice or display is constitutionally permissible. The Fifth Circuit below opined that "[h]ad this monument been recently installed, the inference of religious purpose would have been stronger." 351 F. 3d at 181-12; *see Marsh v. Chambers*, 463

U.S. 783 (1983). But a determination that something is a "religion" turns on *content*, not age. The length of time a practice has been performed by public officials or the length of time a display has been present on public property has absolutely nothing to do with whether it is a religion. This becomes readily apparent if one contrasts, for example, Judaism and Hare Krishna: both of those religions relate what duties they believe are owed to the Creator and spell out the manner in which each maintains those duties should be carried out, but Judaism has a much longer heritage than Hare Krishna. Regardless of their relative ages, both are religions under the First Amendment.

In a similar illogical vein, the Fifth Circuit observed that while the Texas Ten Commandments monument is not displayed in a "museum setting," which would wholly negate endorsement, the manner in which the seventeen monuments are presented on the grounds of the Capitol tour supports the conclusion that a reasonable viewer would not see this display . . . as a State endorsement of the Commandments' religious message . . . ." 351 F. 3d at 181; *see Lynch v. Donnelly*, 465 U.S. 668 (1984). Again though, context does not define whether something is a religion, *content* does. Whether the Commandments are displayed in a museum or a public park, and whether they are displayed alone or are surrounded with other things is irrelevant to whether they prescribe the duties we owe to the Creator and the manner of discharging them, *i.e.*, whether they fall under the constitutional definition of religion.

The Texas monument is not religion; rather by displaying the Ten Commandments Texas is acknowledging God as the moral and historical foundation of the country's legal system.[18]

[18] Petitioner Van Orden concedes, even bemoans, that Texas's Ten Commandment monument "unequivocally proclaims that there is a God and that God has decreed rules for religious observance and non-religious conduct." Brief for Petitioner at 37. Van Orden fails, however, to demonstrate or even assert that this constitutes "religion" under the proper constitutional definition of the word.

Examples of such acknowledgments are replete throughout our history. Thanksgiving proclamations encouraging citizens to offer gratitude to God for "His kind care and protection" have been issued by Presidents of the United States ever since George Washington issued the first one on October 3, 1789. *See* 4 *The Papers of George Washington, Presidential Series* 131-32 (W. W. Abbot et al. eds. 1987). Since the passage of the Judiciary Act of 1789, all federal judicial officers have been required to take an oath of office swearing to support the United States Constitution that concludes with the phrase, "So help me God." *See* 28 U.S.C. § 453.

"In God We Trust" was first placed on the nation's coinage in 1864 to "express[] in a few words," as then-Secretary of the Treasury Salmon P. Chase explained, "the recognition of the trust of our people in God." Anson P. Stokes & Leo Pfeffer, *Church and State in the United States* 568 (rev. ed. 1964). The motto has appeared on all U.S. coins since 1938 and on all currency since 1964. *Fact Sheets: Currency & Coins—History of "In God We Trust,"* United States Department of the Treasury, *at* http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.html. Congress made "In God We Trust" our official national motto in 1956. 36 U.S.C.A. § 302.

As was previously mentioned, the words "under God" were added to the Pledge of Allegiance in 1954. *See* 4 U.S.C. § 4. The report from the House of Representatives that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 83-1693, at 2 (1954).

Posting the Ten Commandments, particularly on public grounds where the law is rendered and adjudicated, represents another acknowledgment of God fitting with the tradition and obligation performed throughout the nation's history. Under no version of the facts presented could it be said that the Texas Capitol monument represents an attempt by the state to dictate the duties that its citizens owe to the Creator, or to enforce the manner in which the citizens should discharge those duties. Consequently, the Texas Ten Commandments monument is not a law respecting an establishment of "*religion*."

2. The definition of "establishment"

Even if it is assumed that the Ten Commandments monument is a "law" under the First Amendment—which it is not—and even if it is assumed that the monument pertains to "religion" under the First Amendment—which it does not—the Texas Capitol monument does not represent an "establishment" of religion.

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II J. Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God

in any manner contrary to their conscience." 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. There never was an established religion without all these.

H.R. Rep. No. 33-124 (1854).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992).

The Texas monument of the Ten Commandments does not in any fashion represent the setting up of a state-sponsored church, nor does it in any way lend government aid to one faith over another. Indeed, the Texas monument "displays a nonsectarian version of the text of the Ten Commandments," clearly avoiding any favoritism of a religious sect. *Van Orden*, 351 F.3d at 176. Moreover, the "monument requires virtually no maintenance." *Id.*

This Court and multiple lower courts—including the Fifth Circuit below—have recognized that the Ten Commandments hold an important place in this country's historical and legal tradition.

> Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching *cannot deny its influence upon the civil and criminal laws of this country*. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society.

351 F.3d at 181 (emphasis added). The court below concluded that Texas's monument did not endorse religion, but added:

> To say this is not to diminish the reality that it is a sacred text to many, for it is also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people. *The power of that counsel is evidenced by its expression in the civil and criminal laws of the free world.* No judicial decree can erase that history and its continuing influence on our laws—there is no escape from its secular and religious character. *There is no constitutional right to be free of government endorsement of its own laws.*

Id. at 182 (emphasis added). *See also Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) ("the Ten Commandments [did not] play[] an exclusively religious role in the history of Western Civilization."); *King v. Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from these final six commandments."); and *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.").

Given the undeniable general influence of the Ten Commandments in this country's historical and legal tradition and the lack of any showing that Texas's Capitol monument shows support for or gives aid to a particular church or

religious sect, the monument cannot be said to concern an "*establishment*" of religion. Therefore, no portion of the Establishment Clause of the First Amendment prohibits public displays of the Ten Commandments in Texas, Kentucky, or any state in this nation.

CONCLUSION

For the reasons stated, this Honorable Court should affirm the Court of Appeals' decision below and hold that the Ten Commandments monument at issue does not violate the United States Constitution, that is, the text thereof.

Respectfully submitted,

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January 31, 2005

No. 03-1500

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF FRATERNAL ORDER OF EAGLES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The monument being challenged in this case was donated by the Fraternal Order of Eagles. The Interest of *Amicus Curiae*, which is thus more fully developed than a normal *Amicus*, is provided below.

On February 6, 1898, the Fraternal Order of Eagles was founded by six theater owners sitting in a pile of lumber in Moran's shipyard in Seattle, Washington. Competitors in the theater industry, they met to discuss a musician's strike. After deciding what to do on that issue, they decided to resolve their differences and form an organization dubbed the "Seattle Order of Good Things," a few weeks later renamed the Fraternal Order of Eagles. The Order asked its members to "make human life more desirable by lessening its ills and promoting peace, prosperity, gladness and hope." Members received free medical attention (as did the individual's family), weekly payments in case of sickness, and a funeral benefit – all valuable services before the widespread availability of medical, disability, and life insurance.

The first meetings were held on the stages of various local theaters, and after the business was settled, a keg of beer was rolled out and all enjoyed a few hours of social activities. Most of the first Eagle members were connected with the theatre – actors, stagehands, directors and playwrights. As some of these members went on tour, they carried the story of the new order with them across the

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

United States and Canada, leading to a rapid growth in membership across the country. The first Lodges or Aeries sprung up in metropolitan areas such as New York and Philadelphia where theatre and the arts had widespread cultural appeal. The mission of the Fraternal Order of Eagles reads, "The Fraternal Order of Eagles, an international non-profit organization, unites fraternally in the spirit of liberty, truth, justice, and equality, to make human life more desirable by lessening its ills, and by promoting peace, prosperity, gladness and hope."

Over the years, the Eagles have fought and won many battles, including hard fought battles for a Workman's Compensation Act, Mothers and Old Age pensions, Social Security laws and "Jobs After 40." The Eagles continue to fight to liberalize present social benefits along with combating vicious diseases plaguing mankind through their sponsorship of the Art Ehrmann Cancer Fund, Max Baer Heart Fund, Robert Hansen Diabetes Fund, Jimmy Durante Children's Fund, "Doc" Dunlap Kidney Fund and the Lew Reed Spinal Cord Injury Fund.

The Eagles hold sacred four pens that have been the instruments of the betterment of mankind. The first pen was presented in 1923 by Montana Governor Joseph M. Dixon after he signed America's first old age pension into law. The Eagles advocated the need for social security well before the Great Depression and well before anyone else perceived the danger of the government not assisting the elderly and those in need. At the time Governor Dixon signed, he said "you Eagles have planted this seed, if the Eagles of the United States never do anything else, they have more than justified their existence in their advocacy of this great humanitarian movement."

The second pen was presented to the Fraternal Order of Eagles by President Franklin D. Roosevelt in 1935 after he signed the Social Security Act. At the time he said, "The pen I am presenting the order is a symbol of my approval of the fraternity's vision and courage, may its possession inspire your members to dedicate their efforts and those of the fraternity to bring a greater degree of happiness to our people."

The third pen was presented to the Fraternal Order of Eagles in 1964 by President Lyndon B. Johnson after he signed the Medicare amendment to the Social Security Act into law. At the time he said "for your energetic and dedicated espousal of social justice, and for the generous support you have given to all measures designed to further economic opportunity and the compassionate treatment of the sick and disabled."

The fourth pen was also presented to the Fraternal Order of Eagles by President Lyndon B. Johnson in 1965 after he signed the federal "Jobs After 40" bill that outlawed upper age limits in hiring. At the time he said, "The Eagles started this whole idea. That is why I invited the Eagles to be at this private bill signing, and the reason I am presenting this pen to the Fraternal Order of Eagles."

It has been the Eagles long standing advocacy for social justice that has attracted many great social and political leaders to join as members of the organization. Such members include: President Franklin D. Roosevelt, President Harry S. Truman, President Warren G. Harding, President John F. Kennedy, President Ronald Reagan, President Jimmy Carter, entertainer Bob Hope, singer Billy Ray Cyrus, movie director Cecil B. DeMille, actor Yul Brynner, Olympic legend Jim Thorpe, Wisconsin Governor

Bob La Follette (one of the most significant leaders of American progressivism, championing the rights of the poor, workers, women and minorities), entertainer Danny Thomas, actor and heavyweight boxing champion Max Baer, heavyweight boxing champion Joe Louis, heavyweight boxing champion Jack Dempsey, and baseball hall of famers Joe DiMaggio, Honus Wagner, Bob Feller and Cy Young.

As preserved in the minutes of the 1954 Grand Aerie Convention Proceedings, the Youth Guidance Committee of the Fraternal Order of Eagles determined that there existed a problem across the country concerning juvenile delinquency and juvenile crime. The Eagles sought to inspire the youth to put their efforts toward the common good just as the former generations had championed social security and social justice for the common man. The Eagles sought to remedy this situation through a social awareness campaign.

It was proposed that the Eagles engage in a program to highlight the ten commandments as the foundation of law in our culture and thus could serve as a nice shorthand of rules to govern personal conduct that would lead to a productive life. The Eagles donated thousands of monuments bearing the ten commandments across the nation to do its part to battle the ills of juvenile delinquency and crime. The ten commandments version used was a compilation produced by a group of Jewish, protestant and Catholic leaders. The goal of the ten commandments project was to acknowledge the ten commandments' historical impact on the development of Western legal tradition and, through reminding the public of this historical fact, inspiring the youth to live law-abiding and productive lives. The Eagles seek to preserve these

monuments to continue its battle to achieve social justice in this nation through the awareness that only by serving others above oneself can anyone achieve a full and complete life.

SUMMARY OF THE ARGUMENT

The Fraternal Order of Eagles is a social justice organization that has dedicated itself to the establishment of social safety nets such as Social Security and Medicare, helping to find the cure for diseases that plague mankind and develop within the American youth a sense of selfless service for the community. The ten commandments monument at issue in this case is a part of an effort by the Eagles to educate the youth about an historical root of American law and a basic foundation of living life in service of others above self. The context of this particular monument is especially appealing to this purpose because it sits in an area of the capitol grounds that feels like a virtual museum with various other plaques and monuments, some bearing religious inscriptions and imagery.

The ten commandments are part of the secular history of our nation. They are a reflection of an historical root of American law and indeed serve as a reminder that our law is not a modern invention but rather a distant descendant from an earlier time when laws based on universally accepted standards of behavior first began.

Our constitutional jurisprudence does not require us to erase the religious content from our historical monuments. Such a brooding hostility is not the law. The intentional exclusion of religion from the public square does not send a neutral message. Instead, such intentional exclusion

sends a harmful message to the public that it is improper for us to publicly acknowledge any parts of our history and culture with religious content. A state should be free to acknowledge all of its history. The Establishment Clause was never intended to be used to censor our religious history and culture. The Fraternal Order of Eagles simply seeks to preserve our cultural and legal heritage for future generations to grow in their respect for the law and for each other.

ARGUMENT

I. INTRODUCTION

The monument in question was donated in 1961 to the state by the Fraternal Order of the Eagles, a non-religious civic organization founded in 1898 as "The Fraternity for the Common Man." The monument contains the ten commandments as well as the Chi Rho, a symbol of Christianity, the Star of David, a symbol of Judaism, the all-seeing eye, a secular symbol, as well as decorative symbols of no religious significance. The monument also bears an eagle gripping an American flag, demonstrating the Fraternal Order of Eagles and the Order's acknowledgement of its duty to the people of this nation to promote justice and equality. Although the monument includes religious content, the State of Texas is not promoting religion or a particular religion. In fact, it was not the desire of the Fraternal Order of Eagles to promote any particular religious thought at all. The Eagles simply desired to reflect the historical roots of certain behavioral standards that are recognizable and part of the foundation of our culture to encourage the youth to lead more socially productive lives.

Petitioner spends five pages explaining to the Court the different versions of the ten commandments, including making an obvious factual error. Petitioner states on page thirteen of his brief, "[w]hat Texas has placed on its capitol grounds is a version of the Ten Commandments accepted by certain Protestant denominations, but rejected by other Christians as well as Jews." This statement ignores the true origin of the version of the ten commandments provided by the Fraternal Order of Eagles.

The Eagles, recognizing that various faith groups have differing versions of the ten commandments, brought many faith groups together to formulate a universally acceptable version of the ten commandments.[2] The Eagles felt comfortable using such a version, because the Eagles never intended to convey a religious message, as such is not consistent with the mission of the organization. Instead, the Eagles simply sought a message that would serve as a reminder of the historical roots of our legal system and encourage the youth to adhere to basic principles of civility, honor their elders, not be motivated by the greed that can so often take hold of a person in a free market economy such as ours, and lead more productive lives.

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[2] "Initially the Eagles rejected the notion of sponsoring the National Youth Guidance Program (erecting ten commandments monuments) because it was felt that such distribution 'might seem coercive or sectarian.' However, after representatives of the Jewish, Protestant, and Catholic faiths were able to develop a version of the Ten Commandments which was not identified with any particular religious group, the Eagles agreed to support such a youth guidance program."

State of Colorado v. Freedom From Religion Foundation, Inc., 898 P.2d 1013, 1017 (Colo. 1995).

The monument does include religious content. However, there is a vast difference between government sponsorship of religion and recognition of religion or religious facts. We do not ban Renaissance paintings from the National Museum of Art because they have religious content. Neither do we ban Handel's *Messiah* from being played in our city symphony halls.

All monuments on the Texas capitol grounds are legitimate representations of Texas or United States history. Neutral accommodation requires acceptance of that which is representative of state or national history, even if it has religious content. It requires recognition of religious content *along with* other ideas and expression. The acknowledgment of religious content is not the same as endorsement of religion. Acknowledgement is neutral. The refusal to acknowledge religion along with other ideas or expressions is hostility to religion and censorship.

If mere government recognition of religious content or a particular religious perspective on secular thought is a violation of the Establishment Clause as Van Orden alleges, then we are faced with an imposed censorship which treats religion and religious expression differently from other types of ideas and expressions. If the state totally isolates itself from any perceived connection with religion, but recognizes all similar and competing ideas, then the result will be hostility toward religion and state control of ideas – a situation which the First Amendment was designed to prevent. The Eagles seek simply to ensure that their expression of a desire for the youth to follow a set of moral principles and serve others for the betterment of mankind receives the same protection as the propagation of other secular ideas and goals, even though the monument includes religious content.

II. FACTUAL CONTEXT OF MONUMENT

The Texas Capitol Grounds are a square area of land bordered by the following four streets: 15th, San Jacinto, 11th, and Colorado. All the land contained within the four streets makes up the Capitol Grounds (the "grounds"). The grounds contain seventeen (17) monuments as well as numerous plaques, dedications, seals, etc. The grounds contain ten (10) buildings including the Capitol Building and the Supreme Court Building. The monument in question is located in a small park-like subsection of the grounds between the Supreme Court Building and the Capitol Building. The monument is 123 feet from the Supreme Court Building and seventy-nine and one-half (79.5) feet from the Capitol Building. There are four (4) other monuments in this small park-like subsection of the grounds. These monuments are labeled "Tribute to Texas Children," "Texas Pioneer Women," "Statue of Liberty Replica," and "Pearl Harbor Veterans" by a pamphlet published by the State Preservation Board. The monument is 121 feet from the "Tribute to Texas Children" monument, 131.5 feet from the "Texas Pioneer Women" monument, 162.5 feet from the "Statue of Liberty Replica," and 244 feet from the "Pearl Harbor Veterans" monument.

Overlooking this area of land from atop the Capitol Building is the "Goddess of Liberty" statue. A wide spectrum of groups ranging from Wicca to illuminati religious perspectives adhere to the notion that she has qualities of divinity. Also facing the grounds from the Capitol is the seal of Mexico, an eagle holding a serpent in its mouth. This symbol, like the Goddess of Liberty and the ten commandments, also has religious roots. The seal represents Aztec prophecy which Mexican folklore claims compelled the natives to build Mexico City in the middle of a lake. In viewing distance of the ten commandments

monument, a display with religious and secular roots, are four secular monuments and two additional secular displays with religious (though not Judeo-Christian) and secular roots.

Within the Capitol Building, approximately 80 feet from the monument, an array of monuments, plaques, dedications, inscriptions, and seals can be found depicting both the secular and religious roots of Texas history. Among the secular displays in the rotunda are a Tribute to African American Legislators, a confederate plaque, a War with Mexico plaque, and a plaque commemorating those who donated the granite for the building. The entire Texas State Capitol has been designated a National Historic Landmark and visitors to the Capitol are informed of this by a large plaque in the rotunda. Among the displays with religious roots or references is the Six Flags over Texas display in the floor of the rotunda. This display contains the Mexican eagle and serpent, a symbol of Aztec prophecy, as well as the confederate seal containing the words "Deo Vindice" which translate, "God will Judge." It should also be noted that the historic Supreme Court room in the Capitol Building contains the following inscription on the bench, "*Sicut Patribus, Sit Deus Nobis*," which translates, "As God was to our fathers, may He also be to us." Texas does not treat religious thoughts and content as subversive, but, as it should, treats religious and secular thoughts equally, recognizing the importance of both in the history of Texas and this country.

III. THE TEN COMMANDMENTS DISPLAY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

While the Fraternal Order of Eagles is a secular social justice organization, it desires to protect the monuments it

donated across the nation because these monuments, while they include religious content, serve the secular purpose of the Eagles to encourage the youth to turn from delinquency and embrace a larger mission to serve others. It is difficult to find a suitable message to convey the message to families across the nation that there are basic behavioral standards that historically have formed the root of all other laws and standards. The Eagles felt that the ten commandments best conveyed that message from an historical perspective. Recognition of a religious and historical root of American law does not violate the Establishment Clause.

A. The Ten Commandments are Part of Secular History

On at least four occasions, members of the Supreme Court of the United States have expressly recognized the secular significance of the ten commandments. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 652-53 (1989) (Stevens, J., with whom Brennan, J., and Marshall, J., concurring in part, dissenting in part) (carving of Moses with ten commandments on wall of Supreme Court's courtroom alongside famous secular lawgivers is a fitting message for a courtroom); *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984) (Burger, C. J., noting with approval the presence of depiction of Moses and ten commandments on Supreme Court's wall); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Frankfurter, J., "Innumerable civil regulations enforce conduct which harmonizes with religious concerns. State prohibition of murder, theft, and adultery reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J. dissenting) (the ten commandments, undeniably, "have had a significant impact on the development of secular legal codes of the Western World.")

This secular significance of the ten commandments, and their role in the foundation of our legal system is undeniable. Sir William Blackstone, the preeminent legal educator of the Framers of the Constitution, wrote that all human laws depend upon two foundations: the law of nature and the law of revelation; the doctrines of which "are to be found only in the holy scriptures." Blackstone's Commentaries, Book I, Section 2. Blackstone, in turn, identifies the English King Alfred as the founder of English common law. *Id.*, Book I, Section 3. The laws of King Alfred start with the ten commandments. Harold J. Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach,* 21 U. Cal. Davis L. Rev. 549-575 (1988). Whether one agrees with this philosophy or not, it is an undeniable part of our history and the development of our system of law.

The ten commandments are thus far from being a mere religious text sacred to certain religious groups. Their place in the history of our legal system renders them a powerful symbol of the rule of law. Van Orden's discomfort with the undeniable facts of history are not a proper basis for censoring parts of our history.

B. Ten Commandment displays, in the proper context as present in this case, are constitutional.

In *Stone v. Graham*, while striking down a Kentucky statute mandating the display of the ten commandments in every public school classroom, the Supreme Court indicated that the constitutional infirmaries of the Kentucky practice would disappear if "the ten commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of

history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. Thus, the Court approved the use of the ten commandments, plainly religious provisions included, as a part of a course of study in schools. *Id.*

Numerous courts addressing the constitutionality of government displays of the ten commandments have upheld the displays. For example, the United States Court of Appeals for the Tenth Circuit, in *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), rejected an Establishment Clause challenge to an illuminated, permanent display of a monument depicting the ten commandments on the grounds of a courthouse. The court held that the monument was merely a "depiction of a historically important monument with both secular and sectarian effects," presented primarily for its historical significance. *Id.* at 34. The court concluded that it would be unreasonable "to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era." *Id.* at 34.

Similarly, in *State v. Freedom from Religion Foundation*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996), the Colorado Supreme Court upheld the display of a ten commandments monument on the grounds of the State Capitol. The monument in the Colorado case is situated in an outdoor park in Denver, among a number of other monuments and tributes commemorating various historical events, characters, and concepts. *Id.* at 1015-16. Concluding that the display was appropriately included in such a forum, the court reiterated the secular significance of the ten commandments:

> All the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

Id. at 1024. The court held that the display "fits within the mélange of historical commemorative accounts found in Lincoln Park." *Id.* Moreover, "the display of monuments in Lincoln Park teaches a history of rich cultural diversity – due to our past it would be inaccurate to ignore a history that includes religion." *Id.* at 1025.

In addition, *Suhre v. Haywood Cty.*, 55 F. Supp.2d 384 (W.D.N.C. 1999) upheld a ten commandments display. In *Suhre*, the passive display of the ten commandments in a county courtroom next to a substantially larger sculpture of Lady Justice did not violate the Establishment Clause because the display as a whole did not convey a religious message. *Suhre*, 55 F. Supp.2d at 399.

C. The monument does not endorse religion

The Supreme Court has sent conflicting signals about whether the well-known *Lemon* test should be applied in cases of this nature. *American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board*, 243 F.3d 289, 305-6 (6th Cir. 2001) (en banc). See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Assuming *Lemon* remains the appropriate test, it is clear that the State Capitol's collection of monuments, including the display of the ten

commandments, pass the constitutional requirements of the Establishment Clause.

Under *Lemon*, the State's action must have a secular purpose. *Lemon*, 403 U.S. at 612-13. The Supreme Court, in determining whether a secular purpose exists, has simply required that the display not be "motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). The fact that a monument conveys some religious meaning does not cast doubt on the existence of valid secular purposes for its display. *City of Elkhart v. Books*, 532 U.S. 1058, 1063 (2001) (Rehnquist, J., dissenting)

As noted by the District Court in this case, "the best evidence of the State's purpose is found in Senate Concurrent Resolution Number 16, the legislative act which permitted the Fraternal Order of Eagles to place the ten commandments on the Capitol grounds." (R. 329) Memorandum Opinion and Order 10/02/02, p. 9. The resolution plainly states that the monolith was "presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency." Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195; Jt. Ex. 1. Van Orden stipulated that the "promotion of morality is a valid secular purpose." Pltf's Ex. 67, No. 4. Given the stipulation and the plain intent of the legislature as expressed in the resolution, the inquiry as to whether this prong of the *Lemon* test is met need go no further.

"Unless it seems to be a sham, . . . the government's assertion of a legitimate secular purpose is entitled to deference." *Chaudhuri v. State of Tennessee,* 130 F.3d 232, 236 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998). Both the legislature's stated purpose and the stated

purpose of the Fraternal Order of Eagles regarding this project are clear that the monument was erected for the secular purpose of encouraging the youth to turn from delinquency and to promote youth morality.

The second prong of the *Lemon* test is whether the primary effect of the government's action either advances or inhibits religion. *Lemon*, 403 U.S. at 612-13. The effect prong has been further refined by Justice O'Connor's "endorsement test" as illuminated in the Court's opinion in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 778-780 (1995) (O'Connor, J., concurring). According to Justice O'Connor, endorsement *vel non* is to be judged by a "reasonable observer" standard. This reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears," *Id.* at 780. While "there is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion," that "someone" does not personify the community ideal with which we are concerned in applying the endorsement test. *Id.*

Applying this prong of the *Lemon*-plus-endorsement test, it is clear that no reasonable observer of the Capitol's collection of monuments would perceive their primary effect as being one of endorsing religion in general or one religion in particular. Rather, a reasonable observer would see a collection of historical monuments tied together by a common theme – Texas history and the people of Texas. This monument's size and location affords no more importance or prominence than other monuments. To the contrary, the District Court noted that "The ten commandments monument is located . . . well off the usual beaten path for tourists. Indeed, but for the publicity

generated by the present litigation, most visitors to the State Capitol and most residents of the State of Texas would have been unaware of the ten commandments monument." (R. 333) Memorandum Opinion and Order 10/02/02, p. 13. The fact that one of the many monuments on the Capitol grounds has religious connections, origins or connotations in addition to their secular significance would not lead a reasonable observer to conclude that the government is endorsing religion.

The effect prong requires a "reasonable" observer, not a hyper-sensitive objector who is offended by the mere presence of the ten commandments anywhere on the capitol grounds. By the standards of the latter, all government displays of objects with any religious connections are unconstitutional. Would Van Orden have us sand the words off the bench of the original Texas Supreme Court, take the Goddess of Liberty off the Capitol Building, rewrite the Confederate motto and redraw the Mexican flag? Should "In God We Trust" be removed from our money, or "God" be erased from our Declaration of Independence? These are all government displays of objects with religious content that would, by Van Orden's standards, be unconstitutional.

Van Orden attacks the monument solely because it contains religious content. Such a view fails to focus on the context in which the monument is placed, which is the key inquiry in determining the question of endorsement. See *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989). As the District Court properly noted, "Viewed in the proper context, and in light of its history this passive monument cannot be said to advance, endorse, or promote religion to a degree that would require the drastic remedy of ordering the Defendants to remove it from the Capitol grounds."

(R. 333-34) Memorandum Opinion and Order 10/02/02, p. 13-14. The Supreme Court of Colorado considered this issue in *State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), and upheld the display the of a ten commandments monument on the grounds of the State Capitol. One monument among many, the ten commandments monument does not violate the Establishment Clause.[3] Accordingly, the opinion of the Fifth Circuit Court of Appeals and the District Court dismissing Van Orden's claims should be affirmed.

IV. GOVERNMENT SHOULD BE NEUTRAL TOWARD RELIGION, NOT CENSOR RELIGION

In the difficult area of church/state relations, the Supreme Court has reached for the goal of neutrality toward religion and among religions. Neutrality with regard to religion was first discussed in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963). Neutrality meant that the state could neither advance nor inhibit religion. *Id.* at 226.

Often neutrality toward religion is like standing on a sandbar and waiting for high tide. Any possible neutral ground slips away and someone is offended because their perceived idea of neutrality is violated. Mankind cannot be separated from religion. "The history of man is inseparable from the history of religion." *Engel v. Vitale*, 370 U.S. 421, 434 (1962). "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S.

[3] The parties agree that the third prong of the *Lemon* test "entanglement" is not in issue. (R. 329) Memorandum Opinion and Order 10/02/02, p. 9.

306, 313 (1952). Just as there is no way to isolate the religious part of a person from the rest of the person, there is no sieve into which ideas can be placed to sift the religious aspects of ideas from the secular.

In an attempt to grasp the meaning of the Establishment Clause and the government's role with respect to religion, the Supreme Court has attempted to discern the intentions of the authors of the First Amendment. "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied . . . " *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Though people can draw different views from history, it is rather obvious that most of the Founding Fathers believed the United States to be a nation founded on religious expression. If analyzed by today's standards, many government actions early in our nation's history did in fact promote or endorse religion in general. See, *e.g.*, *County of Allegheny*, 492 U.S. at 670-673 (1989) (Kennedy, J., concurring in part and dissenting in part). Surely these men who drafted and adopted the First Amendment and who treasured the rights protected thereby as much as we do today would not take actions to violate the very rights that they had worked so hard to define and protect.

Though neutrality is often difficult to ascertain in the church/state context, the Supreme Court has established a middle ground, in the area of equal access. The concept of equal access prohibits discrimination against religious groups if a public facility is available for use by different groups or organizations. If an open forum is created by a state-operated facility, then religious groups must be allowed to use the facility the same as other groups. The

Supreme Court has repeatedly held that the use of public school facilities by religious groups does not create government support of religion if such use is on the same terms as other groups; rather, the neutral position is accommodation of religious groups along with other groups. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Board of Education of Westside Com. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). Such a policy does not advance religion; instead it serves a neutral purpose. *Widmar*, 454 U.S. at 267. The exclusion of religious groups is religious content-based discrimination and unconstitutional. *Id.* at 276.

Similarly, the monuments of the Capitol grounds are an attempt by a state to express its culture and heritage. Neutrality requires that religious ideas or symbols be permitted along with historical, economic, commercial, or philosophical references. The exclusion of only religious symbols amounts to content-based discrimination and hostility to religious citizens and heritage.

A society functions best when there is free exchange of ideas. The First Amendment makes the free exchange of ideas possible. But today there is a philosophy that certain ideas are not entitled to public debate or expressions because they are religious. This philosophy has nothing to do with the Establishment Clause, but its purpose is the censorship of religious ideas which do not meet the approval of those adhering to the philosophy. As Justice Kennedy stated in *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part), "Judicial invalidation of government's attempt to recognize the religious underpinnings of the holiday would signal

not a neutrality but a pervasive intent to insulate government from all things religious."

The Establishment Clause was enacted to promote the good, religious freedom, and to prohibit the bad, the state attempt to control the minds of its citizens through regulation of religious beliefs and practices. The systematic weeding out of religious ideas and expressions from public life is the very opposite of the purpose of the Establishment Clause. The Establishment Clause was designed to protect the free exercise of religion, not remove it from the public realm.

> Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion.'

Lynch, 465 U.S. at 673 (internal citations omitted).

Mandatory accommodation permits a monument with religious content. The forced removal of the monument would declare that religious expression is a second class form of speech, not entitled to public recognition or constitutional protection. Forced removal would be an example of the "war with our national tradition" and the tradition and heritage of the State of Texas that the Court condemned.

Four decades ago, the State of Texas chose to acknowledge the ten commandments' role in our legal heritage along with the economic, industrial, and social aspects of our heritage. Now, one plaintiff seeks to impose his will on the entire state by forbidding the residents of Texas to recognize a portion of their heritage because of its religious content. The Establishment Clause is not a weapon to eradicate from the public realm any ideas that one disagrees with by labeling them "religious." It is not an instrument to be used to rewrite history.

> These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted to speak . . .

Engel, 370 U.S. at 435.

Van Orden is as free as any resident of Texas to worship or not worship as he pleases. He may ignore the monument if he wishes. It does not exercise any control over him. There are no shackles on his religious expression.

But a shackle will appear if this court decides to prohibit a state from recognizing its religious roots. A society is not free when the state promotes secular ideas and expressions, but squelches religious ideas and expressions. A nation is not free when the state or the court decides to dictate which ideas and symbols must be censored in reflecting history. As Justice O'Connor wrote for the plurality in *Mergens*:

> [t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

496 U.S. at 248 (internal quotation marks and citation omitted).

The Fraternal Order of Eagles never intended to spark a legal battle in 1961, much less one over religion. The Eagles merely sought to encourage young people by pointing to the historical basis for our rule of law and encouraging them to be law-abiding citizens and to know that only by serving others above oneself can anyone achieve a full and complete life. This is not a violation of the Constitution. It is a generous act of good citizenship.

The Eagles beseech this Court to uphold the Court of Appeals below and not issue a ruling which would adversely affect thousands of monuments donated by the Eagles in cities and communities nationwide.

CONCLUSION

For the foregoing reasons, the Fraternal Order of Eagles respectfully requests the Court to affirm the opinion of the Court of Appeals and the order of the District Court dismissing Van Orden's claims in their entirety.

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Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

(13)

No. 03-1500

IN THE

Supreme Court of the United States

Thomas Van Orden,
Petitioner,

v.

Rick Perry, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, et al.,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FREEDOM FROM RELIGION FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. (the "FFRF") is a non-profit educational group whose two primary purposes are to promote the constitutional principle of separation of state and church and to educate the public on matters relating to nontheism.[1] The FFRF was incorporated in Wisconsin in 1978, and it now has more than 5,000 members, who generally describe themselves as "freethinkers," a label intended to include atheists, agnostics and rational skeptics of any pedigree.

The FFRF's activities include a variety of educational programs and, when necessary, litigation. The FFRF's educational activities include publishing the monthly newspaper, *Freethought Today*, sponsoring high school and college essay competitions, conducting conventions, issuing awards, and publishing a wide array of books, pamphlets, and other printed materials. The FFRF also has established a book collection at the Memorial Library at the University of Wisconsin—Madison, and it maintains its own substantial library of literature on freethought and religion at its offices in

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[1] The parties to this appeal have consented to the FFRF's filing of this brief amicus curiae. The Petitioner's blanket consent to the filing of briefs amicus curiae is on file with the Court, and the Respondent's written consent to the FFRF's filing is submitted with this Brief. Pursuant to Supreme Court Rule 37.6, the FFRF states that no counsel for any party authored this brief in whole or in part and that no party or entity other than the FFRF, its affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

Madison. More information about the FFRF and its programs is available at its web site, www.ffrf.org.

The FFRF has been an active litigant on behalf of its members and other citizens concerned with governmental involvement with religion, and it has filed twenty-three suits alleging First Amendment violations since its inception. Although the FFRF is committed to nontheism and religious skepticism, it has on occasion worked with religious groups who share the FFRF's objections to the governmental endorsement of religion. In fact, many of the co-plaintiffs in suits filed by the FFRF are themselves religious individuals who also are committed to the principle that government must remain rigorously neutral in religious matters.

The FFRF's legal successes include: preventing the State of Wisconsin from declaring Good Friday a legal holiday, *Freedom From Religion Found. v. Litscher*, 920 F. Supp. 969 (W.D. Wis. 1996); barring direct taxpayer subsidy of religious schools, *Freedom From Religion Found., Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001); terminating the funding of faith-based substance abuse treatment programs, *Freedom From Religion Found. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002); and ending a long-term practice of illegal Bible instruction in public schools, *Doe v. Porter*, 370 F.3d 558 (6th Cir. 2004).

The FFRF has a particular interest in this case. The FFRF first challenged the display of a Fraternal Order of Eagles Ten Commandments monument in 1985. *See Freedom From Religion Foundation, Inc. v. Zielke*, 663 F. Supp. 606 (W.D. Wis. 1987), *aff'd*, 845 F.2d 1463 (7th Cir. 1988).

Since the Seventh Circuit's decision in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), the FFRF has again devoted significant effort to challenging the display on government property of the Ten Commandments monuments donated by the Eagles. After requests from the FFRF, the Wisconsin cities of Milwaukee and Monroe removed The Eagles' Ten Commandments monuments from public property. The City of La Crosse, Wisconsin, however, has refused to remove a Ten Commandments monument from a city park and, instead, it attempted to sell a sliver of land under the monument to the Eagles. The FFRF sued the city on behalf of twenty-two area residents, including both the religious and the non-religious, alleging that the display of the monument and the attempted sale of the land violated the Establishment Clause of the First Amendment. Judge Barbara B. Crabb's cogent decisions in favor of the plaintiffs, including the FFRF, contain a model analysis of the constitutional problem of governmental endorsement of religion through the display of a religious monument. *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999 (W.D. Wis. 2004).[2]

The FFRF has a substantial interest in the question presented to the Court in this appeal. As a result of its scholarly and educational activities, and as a result of its participation in litigation involving the Ten Commandments, the FFRF believes that its brief will present an important and unique perspective that will

[2] The second decision was necessitated by the post-judgment intervention of the Eagles as a defendant in the case.

assist the Court in resolving the Constitutional questions before it.

SUMMARY OF THE ARGUMENT

The State of Texas, like numerous other state and local governments throughout the United States, has chosen to display on public property a tablet-shaped stone monument engraved with a version of the Ten Commandments, which begins:

> the Ten Commandments
> I AM the LORD thy God
> Thou shalt have no other gods before me
> Thou shalt not make for thyself any graven images
> Thou shalt not take the Name of the Lord thy God in vain
> Remember the Sabbath day to keep it holy

The stone monument was a gift to the State from the Fraternal Order of Eagles, who made many such gifts in the 1950s and 1960s as part of its Youth Guidance Program intended to combat juvenile delinquency by providing a code of conduct for young persons. *Books*, 235 F.3d at 294. The Eagles do not shrink from the religious message of the monuments they gave. After the FFRF objected to the display of the Eagles monument in La Crosse, for example, the secretary of the local chapter of the Eagles wrote to the city that "we believe in the ideas etched in this piece of stone." *Mercier*, 305 F. Supp. 2d at 1014.

The State of Texas has participated in the Eagles' Youth Guidance Program by accepting the monument and

displaying it on the state capitol grounds. The State itself has thereby unequivocally endorsed the Ten Commandments—including those first four inherently sectarian precepts—as a proper code of conduct for Texas citizens. Judaism and Christianity thus bear the imprimatur of the State of Texas. Despite the fact that Texas citizens are legally free to worship however they choose, only Christians and Jews practice a faith that has been publicly approved by the State. For this reason, the 1961 resolution of the Texas legislature accepting the monument and agreeing to display it on government property is a law respecting the establishment of religion, and it contravenes the First Amendment.

ARGUMENT

For more than three decades, this Court's Establishment Clause jurisprudence has been guided by some version of the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), although it is now *de rigueur* for federal courts at all levels to express misgivings about its continued vitality. The question of whether *Lemon* still provides the proper framework for analyzing Establishment Clause issues is not presented in this case, but it is at issue in this Court's review of *American Civil Liberties Union v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004), also involving a challenge to the display of the Ten Commandments, though not in the form of the Eagles monument at issue here.

A majority of this Court has criticized *Lemon* at one time or another, but another majority appears prepared to

embrace Justice O'Connor's endorsement analysis based on *Lemon*, which she articulated in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), and has refined in several cases since, notably *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623-37 (1989) (O'Connor, J., concurring). For the purposes of this appeal, which does not involve the third prong of the *Lemon* test, the differences between the *Lemon* test and the endorsement analysis are not great. Under the endorsement test, the Establishment Clause of the First Amendment is violated by

> government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch, 465 U.S. at 688. The first two prongs of the *Lemon* test, which address the government's actual intent and the objective effect of its actions, provide a useful framework for determining whether endorsement has occurred.

This is a vital interest of members of the FFRF, who are every day cast as outsiders, and often physically threatened, simply for disclaiming belief in God or expressing a commitment to the separation of Church and State. The law does not prohibit boorish behavior from private citizens, nor should it. But no one who would treat a fellow citizen with malice or disdain because of his or her religious convictions or skepticism should draw the least

encouragement from the official actions of the government. The endorsement test guards against the government's participation in this evil.

I. The State of Texas, in participating in the Eagles' Youth Guidance Program, intended to endorse religion.

The purpose prong of the *Lemon* test asks whether the challenged governmental action has a secular purpose. *Lemon*, 403 U.S. at 612. It is not enough that the government intends some attenuated secular objective. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). "[T]he proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion." *Id.* at 691. If the government intends a message of religious endorsement, some secondary secular purpose will not save it. *Id.* at 690-91 (citing *Stone v. Graham*, 449 U.S. 39, 41 (1980)).

A. The Ten Commandments, especially as displayed on the Eagles monument, is inherently and predominately religious.

Whether the government's display of a religious symbol communicates a message of endorsement depends heavily on the context of the display. *Allegheny*, 492 U.S. at 595-97. Nevertheless, the nature of the religious symbol itself is crucial to the government's message. *See, e.g., id.* at 582-86 (explicating the meaning of the menorah). Thus, the analysis of Texas' purpose in displaying the Ten Commandments properly begins with an examination of the Eagles monument itself.

The primary feature of the monument, of course, is the text of one version of the Ten Commandments. As this Court has recognized, the Ten Commandments is inescapably a religious text:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Stone, 449 U.S. at 41-42 (footnotes and citations to the Bible omitted). The design of the Eagles monument enhances the religious nature of its main text by including the Jewish Star of David symbol and the Christian Chi Rho symbol. *Books*, 235 F.3d at 302. "It cannot be doubted, therefore, that this monument bearing the Ten Commandments possesses a religious nature." *Id.*

The Ten Commandments cannot now be made secular by showing that they have had an influence on United States law. The Brief of Amicus Curiae Liberty Counsel filed in the appeal to the Fifth Circuit in this case cites numerous examples of state and colonial laws codifying each of the Ten Commandments at the time of the framing and before. *Van Orden v. Perry*, 351

F.3d 173 (5th Cir. 2003) (No. 02-51184). These state and colonial laws are, of course, largely irrelevant to our understanding of the intent of the framers because they pre-date the Fourteenth Amendment which brought state government within the ambit of the First Amendment. As for early pronouncements from the federal government encouraging obedience to the Ten Commandments, this Court has made clear that our nation's "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 604-05. Ultimately, these examples simply prove too much: in the early days of the Republic, overtly religious precepts were enshrined in the law of the States, and draconian penalties were imposed for violating them. These religious precepts cannot today be deemed secular and endorsed by government simply because they were at one time enacted in law.

B. The commemoration of the Eagles' Youth Guidance Program is not a genuinely secular purpose.

The State of Texas contended that its purpose in accepting the Eagles monument and displaying it on government property was to "congratulate" the Eagles "for their efforts and contributions in combating juvenile delinquency throughout our nation." Brief of Appellees at 6, *Van Orden* (No. 02-51184). The legislative history relating to the acceptance of the monument is apparently quite thin, containing no record of any discussion about the monument or the reasons for its acceptance. *Van Orden*, 351 F.3d at 176. The congratulatory statement is apparently

the only contemporary expression of the legislative purpose of the display. *Id.*

The circuits are divided about the degree to which the government's stated purpose for a religious display is entitled to deference. In light of the inherently religious nature of the Eagles monument, the Seventh Circuit imposed on the government the burden of proving that it has taken steps to "obviate its religious purpose." *Books*, 235 F.3d at 303 n. 8 (citation omitted); *see also Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001). The Fifth Circuit, on the other hand, more readily deferred to the government, concluding that "[w]e are not persuaded that the Resolution of the Texas Legislature in 1961 was a sham." *Van Orden*, 351 F.3d at 178-80. The Fifth Circuit, unlike the Seventh, will apparently accept a government's recited secular purpose unless it is affirmatively shown to be an intentional fraud.

The Fifth Circuit's deference to the Texas legislature does not square with this Court's conclusion in *Stone* that "no legislative recitation of a supposed secular purpose can blind us" to the sacred nature of the Ten Commandments. 449 U.S. at 41. This Court should reject the State's alleged purpose in passing the 1961 resolution, not because it was an intended fraud, but because the State's purpose of congratulating the Eagles' accomplishments is not legitimately secular.

"Congratulating" is among a category of purposes whose secularity cannot be evaluated in the abstract. Congratulate means "to express sympathetic pleasure to

on account of success or good fortune."[3] Other such purposes that cannot be evaluated in the abstract include "honoring," "commemorating" and "memorializing." These purposes might be usefully labeled "transitive purposes," because they require an object to complete their meaning. Such a transitive purpose is not secular unless both the means of accomplishing it and its object are secular.

To illustrate the requirement that the means of serving these purposes be secular, consider the purpose of "beautification." It is without doubt a legitimate secular government objective to beautify the landscape of a public park. But "beautification" is not a legitimate secular purpose if beautification is achieved by means of the erection and display of a religious monument in a city park. *See, e.g. Gonzales v. North Township*, 4 F.3d 1412, 1421 (7th Cir. 1993). The purpose offered by the government to justify the use of religious iconography must explain not just the desire to erect some type of beautifying display, it must explain the reasons for the specifically religious character of the display. If the purportedly secular purpose does not explain the religious character of the display, but only explains the impulse to beautify, the purpose prong of the *Lemon* test has not been satisfied because the government has effectively offered *no* reason for a specifically religious display, regardless of the sincerity of the government's interest in beauty.

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[3] Webster's Third New International Dictionary Unabridged 478 (1981).

Mercier provides an example of an appropriate secular object, but one commemorated through improperly religious means. The City of La Crosse contended that the Eagles monument in a city park was intended to commemorate the efforts of young people in helping to fight a flood. The district court, the Honorable Barbara B. Crabb presiding, rejected this purpose as not truly secular:

> Defendant makes a half-hearted attempt to demonstrate a secular purpose by pointing to the fact that the monument was dedicated to those who participated in efforts to protect the city from the 1965 flood, but this argument is not persuasive. First, it is difficult to see how dedicating a monument to a particular group can diminish its religious nature. A Bible is no less holy because the blank line following the phrase "Presented To" in the front cover is filled with the name of a non-believer instead of a Christian minister. Building a church in memory of a beloved parishioner does not make it any less a place of worship. Similarly, using the monument to recognize the achievements of the city's youth does not alter the religious message that the monument conveys.

Mercier, 276 F. Supp. 2d at 973-74. The principle here is a simple one: the content of a religious display must substantially relate to the legitimate secular object that the legislature intended to commemorate. There would have been nothing improper about commemorating the public service of the city's youth, but to do so by means of the display of a religious code of conduct—which bore utterly

no relation to the events commemorated—unquestionably communicated the city's endorsement of that code.[4]

The object of the transitive purposes of congratulation, commemoration or honor must also be secular, because inherent in these concepts is the expression of approval. Therefore, a legislature is not serving a secular purpose when it is offering congratulations for, commemorating or honoring events or achievements that are themselves predominately religious.

In the Texas case, neither the object nor the means of congratulation were secular. As for the means, the Texas legislature's interest in commemorating the civic contributions of the Eagles would have been properly achieved by a monument *to* the Eagles, one that expressly recited and acknowledged those civic contributions. But the monument erected on the Texas Capitol grounds does not do so. The State's purported desire to commemorate the Eagles does not explain why the State would display the text of the Ten Commandments instead of a plaque saying "congratulations and thank you" to the Eagles.

The object of the Texas legislature's congratulation is even more dominated by religion. The Eagles' "efforts and contributions in combating juvenile delinquency throughout our nation" consisted of the Youth Guidance Program, which was simply a program to arrange for the

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[4] Moreover, in La Crosse, the city's alleged purpose was demonstrably a sham: the city had voted to accept and display the monument in 1964, well before the flood had occurred. *Mercier*, 276 F. Supp. 2d at 974.

display of the Ten Commandments on public property. Even if the Fraternal Order of Eagles is not a religious institution, the stated purpose of its Youth Guidance Program is, undeniably and predominately, religious: to expose youths to the Ten Commandments as a common code of conduct and to encourage citizens to contemplate and embrace its precepts. *Books*, 235 F.3d at 294.

Ultimately, the State of Texas has commemorated and honored the Eagles Youth Guidance Program by directly participating in it. The State has thus not merely endorsed the religious message of the Eagles monument, it has affirmatively aided the Eagles in its efforts to secure adherence to the religious precepts so plainly expressed on it.[5]

This Court should reverse the holding of the Fifth Circuit that the State of Texas had a valid secular purpose for the display of the Ten Commandments on the capitol grounds. In doing so, this Court should make clear that a transitive purpose, such as congratulation, commemoration, or honor, is not a valid secular purpose unless both the object and the means of accomplishing it are themselves secular. To put it simply,

[5] The State's second purported secular purpose, advancing the morality of youth, is even more transparently religious. Brief of Appellees at 20, *Van Orden* (No. 02-51184). There is nothing wrong with the State's advancement of youth morality, so long as this objective is accomplished through secular means. But the State cannot pretend that this is a legitimate secular purpose for the display of an inherently religious text. If it were, government would simply have a legitimate secular purpose for endorsing religious devotion in certain specified faiths.

the commemoration of a predominately religious event, or the commemoration of any event through predominately religious means, is an endorsement of religion.

II. The display of the Eagles monument on the grounds of the Texas State Capitol communicates the State's endorsement of religion.

Even if the Texas legislature did not actually intend to communicate its endorsement of religion, its display of the Eagles monument on the grounds of the state capitol runs afoul of the First Amendment because it communicates the endorsement of religion to a reasonable viewer. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (analyzing the purpose prong of the *Lemon* test); *see also Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). The hypothetical reasonable viewer is one who is "aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995). But in this case, the viewer would understand the message of endorsement even if the viewer knew nothing about the Eagles' Youth Guidance Program.

There are, obviously, certain contexts in which a government may display even highly religious texts or images without communicating endorsement. This Court has identified two, a proper school curriculum and a typical museum. In *Stone*, the Court explained that the Ten Commandments can be presented by a government as playing a role in our civic life, such as when it is "integrated into the school curriculum . . . in an

appropriate study of history, civilization, ethics, comparative religion, or the like," 449 U.S. at 42 (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). In *Lynch*, Justice O'Connor explained that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692, *cited with approval in Allegheny*, 492 U.S. at 595.

The Fifth Circuit concluded that the grounds of the Texas state capitol provided a context that negated, or at least sufficiently reduced, the religious content of the Ten Commandments. But the Fifth Circuit did not properly consider two crucial factors that account for the message of endorsement conveyed by the display of the Ten Commandments by the State of Texas: the difference between the institutional mission of the Capitol grounds and the mission of a museum; and the difference between the effect of a religious text and religious symbols.

A. Unlike the display of a religious artifact in a museum, the display of a permanent monument to a religious text on the grounds of a government building inevitably communicates endorsement of religion.

The Fifth Circuit concluded that the display of the Ten Commandments on the Capitol grounds did not communicate endorsement of religion because it determined that the capitol grounds are, in significant ways, like a museum. The court quoted the "typical museum" example as used by Justice Blackmun in

Allegheny, and then reviewed the facts cited by the State of Texas in support of the museum analogy: the grounds contain seventeen monuments; and, the grounds are overseen by the Texas State Preservation Board, which qualifies as a museum under federal law, employs three professional curators, and maintains an art collection with a value of twenty to thirty million dollars. *Van Orden*, 351 F.3d at 180-81. The reasoning on this point is somewhat obscure, but ultimately the court deferred to the view of the Preservation Board staff that, because of the location of the Eagles monument, its display communicated only a secular message concerning the Ten Commandments' contribution to the law. *Id.* at 181.

The Fifth Circuit has missed the reasons why a typical museum setting does not convey a message of endorsement of the religious content of the art displayed in it. First, the institutional purpose of a museum is collection, preservation, and education.[6] One does not expect to find in a museum only those artifacts whose content the museum endorses. Because the reasonably informed viewer understands the mission of the museum, its display of an artifact is an implicit statement that the artifact is historically important or interesting, but not that its content is endorsed by the museum. The second reason the display of an artifact in a museum does not convey

[6] "Museums make their unique contribution to the public by collecting, preserving, and interpreting the things of this world.... Their missions include collecting and preserving, as well as exhibiting and educating with materials not only owned but also borrowed and fabricated for these ends." American Association of Museums, *Code of Ethics for Museums* (last visited Dec. 9, 2004).

endorsement is that typically a museum contains many artifacts whose diverse content cannot be consistently endorsed. A single museum may, for example, display both devoutly Christian art of the middle ages and Renaissance, and anti-religious art of the Soviet Union. The display of the Soviet art does not in any way "secularize" the Christian art, but a reasonable viewer would not understand the museum to be communicating endorsement of either Christianity or Marxism.

The grounds of the Texas State Capitol are simply not like the typical museum in either its mission or the diversity of the artifacts displayed there:

> [T]he grounds are designated as a National Historic Landmark that is dedicated to the display of "statues, memorials, and commemorations of people, ideals and events that compose Texan identity; these displays document the struggles and the successes that Texans have experienced in the past and serve to inspire us as we face the challenges of today."

Van Orden, 351 F.3d at 180 (quoting H. Con. Res. 38, 2001 Leg., 77th Reg. Sess. (Texas 2001)). The grounds contain seventeen monuments, and visitors will properly understand that each one of them communicates the state's endorsement of the subject that is depicted, memorialized, or commemorated.[7] Some form of endorsement is simply

[7] The seventeen monuments are described and depicted in the State Preservation Board, *Online Gallery: Monument Guide*, at http://www.tspb.state.tx.us/spb/gallery/MonuList/MonuList.htm (last visited Dec. 9, 2004).

inherent in the concept of "monument," and the grounds of the Texas State Capitol is a field of monuments, not a museum.

The hallmark of the typical museum and the proper school curriculum, the quality that neutralizes the message of endorsement that might otherwise attend the display of a religious artifact, is scholarly integrity and independence.[8] A public museum may display religious art, so long as it is selected on the basis of its quality and importance, and not on the basis of its religious message. Students in a public school may be asked to explore the meaning and cultural significance of the Ten Commandments along with other secular and religious codes without running afoul of the First Amendment, so long as they remain free to accept or reject those religious tenets according to the dictates of their own consciences

[8] This ideal is reflected, for example, in The American Association of Museums *Code of Ethics for Museums*, which requires the museum to ensure that its programs "are founded on scholarship and marked by intellectual integrity" and "respect pluralistic values, traditions, and concerns." *AAM Code of Ethics for Museums*, supra note 6. Similarly, the International Council of Museums Code of Ethics for Museums provides that "[t]he museum should seek to ensure that the information it publishes, by whatever means, is accurate, honest, objective and well-founded academically." *ICOM Code of Ethics for Museums*, available at http://icom.museum/ethics_rev_engl.html#2 (last visited Dec. 9, 2004).

without having it affect their standing in the community. The grounds of the Texas State Capitol plainly lack this scholarly detachment: the legislature intended the field of monuments to identify the "people, ideals and events that compose Texan identity." Because one of those monuments endorses the specifically religious tenets of the Judeo-Christian tradition, the Texas legislature has made one's standing as a Texan depend on one's adherence to the Ten Commandments.

In reversing the Fifth Circuit on this point, the Court should make clear that the only contexts in which predominately religious texts or symbols may be displayed are those characterized by rigorous scholarly integrity and independence.

B. Outside a scholarly context, a monument bearing a religious text conveys endorsement of the text's religious tenets.

The Fifth Circuit, like other courts and commentators, finds a precedent for the display of the Eagles monument in the depictions of Moses at the Supreme Court building:

> A display of Moses with the Ten Commandments such as the one located in the United States Supreme Court building makes a plain statement about the decalogue's divine origin. Yet in context even that message does not drown its secular message. So it is here.

Van Orden, 351 F.3d at 182. The Fifth Circuit has overlooked a crucial distinction between the representations of Moses in the Supreme Court building and the Eagles monument at the Texas Capitol. The Eagles monument bears the entire text of a version of the Ten Commandments, whereas the text of the Ten Commandments is not displayed at the Supreme Court.

The distinction is crucial, and it largely explains the difference in the result in *Stone* and that in *Lynch* and *Allegheny*. The display of the full text of the Ten Commandments outside of a scholarly context entails promotion of its inherently religious aspects, which are utterly inescapable in the first four Commandments. Given this unequivocal religious content, displays of the text of the Ten Commandments are properly decided under *Stone*. But religious imagery and symbols are more ambivalent, and often do not unequivocally communicate solely religious doctrine. Displays of religious imagery and symbols therefore require the more extended endorsement analysis set out in *Lynch* and *Allegheny*.

Under *Lynch* and *Allegheny*, the depictions of Moses at the Supreme Court do not communicate religious endorsement. Moses is presented there as an example of a historical law-giver, a commemoration of the evolution of a law-governed society. As the Supreme Court's *The East Pediment Information Sheet*[9] explains:

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[9] Supreme Court information sheets on each of the pediments and friezes are available at http://www.supremecourtus.gov/about/archdetails.html.

> Law as an element of civilization was normally and naturally derived or inherited in this country from former civilizations. The "Eastern Pediment" of the Supreme Court Building suggests therefore the treatment of such fundamental laws and precepts as are derived from the East. Moses, Confucius and Solon are chosen as representing three great civilizations and form the central group of this Pediment. Flanking this central group—left —is the symbolical figure bearing the means of enforcing the law.

Moses is also depicted among the "procession of 'great lawgivers of history,'" which portray the development of the law in the North and South Courtroom friezes. The friezes portray eight allegorical figures and eighteen historical lawgivers, which include the religious figures of Moses and Muhammad, as well as the secular figures of William Blackstone, John Marshall and Napoleon. Muhammad is depicted with the Qur'an, and "Moses is depicted in the frieze holding two overlapping tablets, written in Hebrew. Commandments six through ten are partially visible." *Courtroom Friezes: North and South Walls Information Sheet*.

The East Pediment and the Courtroom friezes focus on the historical lawgivers; the bronze doors on the front portico depict "significant events in the evolution of justice in the Western tradition." *The Bronze Doors Information Sheet*. These significant events allude to, without actually displaying, specific legal codes, including the Justinian Code, the Magna Carta, The Westminster Statute and the Court's decision in *Marbury v. Madison*.

Each of these lawgivers and events is commemorated, even celebrated, at the Supreme Court. But even though some of the lawgivers are religious figures, each is celebrated for his contribution to the development of the law, not for his contribution to religion. *Allegheny*, 492 U.S. at 651 (Stevens, J., concurring in part and dissenting in part) (concluding that the Courtroom friezes "signal[] respect not for great proselytizers but for great lawgivers"). Crucially, the literal texts of the laws of the many historical lawgivers is nowhere presented in the commemorative artwork at the Court. And for that reason, no reasonable viewer would understand the commemorative artwork at the Supreme Court to convey a message of endorsement of the specific precepts set down by all the diverse lawgivers from Hammurabi to Napoleon.

There is no question, however, that the Supreme Court building conveys the unequivocal endorsement of the texts inscribed on the pediments, "Justice the Guardian of Liberty" and "Equal Justice Under Law." Depictions of historical figures and religious symbols are open to multiple interpretations, but the presentation of a literal text as part of a monument typically conveys endorsement.

In contrast to the depictions of Moses at the Supreme Court, the display of the Eagles monument, dominated by the literal text of the Ten Commandments, inevitably communicates the endorsement of the specific precepts of the Commandments. These specific precepts are inherently religious, and they cannot be legitimately presented by a government, unless it is in a context that

negates the message of endorsement. The grounds of the Texas State Capitol does nothing to negate that message.

III. The display of the Ten Commandments is not an acceptable recognition of the sensibility of the religious majority.

The Fifth Circuit framed its Establishment Clause analysis as a kind of balancing test, in which it had an affirmative obligation to recognize "the pervasive presence of strongly held views about religion with myriad faiths and doctrines." *Van Orden*, 351 F.3d at 178. The court made clear, however, that the "strongly held views" it sought to recognize were those of religious adherents, not religious skeptics: "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God." *Id.*, quoting *Abington School Dist. v. Schempp*, 374 U.S. at 206 (Goldberg, J., concurring).

Thomas Jefferson's "wall of separation between church and state" remains, at the very least, a guiding metaphor for this Court's Establishment Clause jurisprudence. *Everson v. Board of Education*, 330 U.S. 1 (1947) (adopting Jefferson's view); *Lynch*, 465 U.S. at 673 (suggesting the "wall of separation" is a useful, but not entirely accurate, figure of speech). Nevertheless, this Court has declined to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny* at 623 (O'Connor, J., concurring). To this point, however, acceptable instances of official governmental recognition of religious beliefs and customs have been restricted to instances of "ceremonial

deism" with minimal religious content. But these are not simply some long-standing instances of endorsement that the Court will overlook; they do not, at least in Justice O'Connor's view, entail endorsement of specific religious beliefs at all.[10] But under the Fifth Circuit's decision in *Van Orden*, acceptable government recognition of religion is indistinguishable from the State's endorsement of the core precepts of the religious majority.

Justice O'Connor's concurrence in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2321-27, *reh'g denied*, 125 S. Ct. (2004), provides a succinct inventory of four factors that indicate whether a religious reference is an acceptable governmental acknowledgment of the religious traditions of our nation. This inventory demonstrates that the display of the Eagles monument at the Texas State Capitol is plainly an endorsement of religion.

The first factor is the history and ubiquity of the religious practice. *Id.* at 2323. Although one does not acquire a vested interest in a constitutional violation, the ubiquity of a religious reference, particularly one that passes without objection, tends to indicate that the

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[10] Justice O'Connor's analysis of ceremonial deism provides a useful framework to demonstrate that the display of the Eagles monument at the Texas State Capitol communicates endorsement of religion. As an organization of religious skeptics, however, the FFRF believes that most instances of ceremonial deism, such as the incorporation of the motto "In God We Trust" on United State currency, communicate governmental endorsement of belief in a single supreme being.

religious reference serves a secular purpose. Although the display of the Eagles monuments has endured in some locations for more than forty years, it can hardly be said the governmental display of the Eagles monuments is as long-standing as the invocation delivered at the opening of Congress. *See Marsh v. Chambers*, 463 U.S. 783 (1983). And, although the Eagles monument at the Texas Capitol may not have prompted litigation before Mr. Van Orden's suit, it did not pass without objection: the FFRF and its Texas members had written to the State requesting its removal for years. And in many locations around the country the display of the Ten Commandments has been contested in court, often successfully, for decades. There is no unbroken tradition of display of the Ten Commandments in the United States; its display continues to generate intense controversy and division whenever it appears on government property.

The second factor is whether the religious reference actually involves worship or prayer:

> Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purpose of solemnizing an event and recognizing a shared religious history.

Elk Grove, 124 S. Ct. at 2324 (citing *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000)). The Ten Commandments are unambiguous on this point: they literally command the reader to worship one God, and they prescribe the means of doing so.

The third factor is the absence of reference to a particular religion. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Elk Grove*, 124 S. Ct. at 2325 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). The display of the text of the Ten Commandments on the Eagles monument obviously breaches this prescription. In the first place, the Ten Commandments is a text sacred to Judaism and Christianity— but not to all religions. And the Eagles monument reinforces this exclusivity by incorporating the Jewish Star of David and the Christian Chi Rho symbol, without symbols of any other religion.

The Eagles monument is even more profoundly sectarian than is apparent from the analysis of its text and iconography. It is commonly repeated that the monument displays a "non-sectarian" amalgamation of Jewish, Protestant and Catholic versions of the Commandments. *See, e.g., Books*, 235 F.3d at 294. But, in fact, the Eagles monuments installed around the country contain textual variations presumably tailored to suit the religious majorities of the communities in which they are displayed. The Eagles monument displayed at the Texas Capitol is the more common "Protestant" version.[11] A "Catholic" version, deleting the second commandment prohibiting the making of graven images and splitting the tenth into two prohibitions of coveting, is displayed at the Colorado

[11] To cite just a few additional examples, the Protestant version was also displayed in: Hanover and Winter Park, Pennsylvania; Grand Junction, Colorado; Manhattan, Kansas; Jefferson City, Missouri; and Frederick, Maryland.

State Capital; in South Bend, Indiana; and formerly in Milwaukee, Wisconsin; and Duluth, Minnesota.[12]

The fourth factor is whether the specifically religious content of the reference is limited. *Elk Grove*, 124 S. Ct. at 2326. In the case of the Pledge of Allegiance, only two of its thirty-one words were religious. But the first four of the Ten Commandments displayed on the Eagles monument in Texas are exclusively religious. The literal text of the Ten Commandments cannot be said to have only minimal religious content.

None of Justice O'Connor's factors suggests that the display of the entire text of the Ten Commandments is an acceptable governmental acknowledgement of our nation's religious heritage. The display of the Eagles monument by the State of Texas is not ceremonial deism, it is not a display of secularized religious symbols, and it is not a commemoration of our legal tradition or heritage. It is, pure and simple, the endorsement of an inherently sectarian text, in a manner calculated to encourage adherence to its precepts. The fact that this display occurs on the grounds of the Texas State Capitol where it is surrounded by other monuments does not neutralize its sectarian purpose; it enhances it. The Texas legislature has used the capitol grounds and the monuments on it to express its view of what it means to be a Texan. By making the Ten Commandments a part of that identity, Texas has

[12] A photograph of the Catholic version displayed in Duluth is available on the web site of the Minneapolis-St. Paul Star Tribune, at http://www.startribune.com/stonline/images/news51/1dulu0308.1.jpg (last visited Dec. 9, 2004).

made one's religious beliefs relevant to one's standing as a citizen, thus violating the central tenet of the Establishment Clause.

CONCLUSION

There is no shortage of opportunities to display the Ten Commandments on private property. In La Crosse, when the city's display of the Eagles monument was challenged by the FFRF, local churches and the La Crosse chapter of the Eagles offered to publicly display the monument on private property. The common council of the City of La Crosse stood firm in the political battle that followed, passing a resolution declaring that the monument "deserves to remain in its present location by any and all means available to the City." *Mercier*, 276 F. Supp. 2d at 964.

The Eagles monuments in La Crosse and Texas, like those throughout the United State, were erected for the predominately religious purpose of securing adherence to particular religious faiths. The Eagles enlisted the assistance of local governments in advancing its Youth Guidance Program, and those local governments shared the Eagles' objectives when they accepted those monuments and agreed to display them. The purportedly secular purposes now offered to explain the display of these monuments cannot disguise the fact that the governments who have displayed them have done so for unconstitutional religious reasons. The Constitution requires that these monuments be removed. No citizen should be made to feel like a outsider in her own community simply because she does not share the religious view of the majority.

The first commandment alone, "Thou shalt have no other gods before me" reveals why it is unconstitutional for the government to display the Ten Commandments. Under the guarantees of the Establishment Clause of the First Amendment, our citizens may have any gods they like, as many gods as they like, or none at all.

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Dated: December 13, 2004

No. 03-1500

Supreme Court, U.S.
FILED
DEC 13 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE HINDU AMERICAN FOUNDATION AND OTHERS, REPRESENTING THE INTERESTS OF HINDUS, BUDDHISTS AND JAINS, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF THE *AMICI CURIAE*[1]

The issue before this Court has particular significance for individuals and groups whose faiths do not embrace the covenantal relationship between God and human beings established by the Ten Commandments as depicted on the monument on the grounds of the Texas Capitol.[2] The *Amici Curiae* represented herein submit this brief to offer the perspective of adherents to several non-Judeo-Christian faiths, and to explain why, from that perspective, the Ten Commandments Monument on the grounds of the Texas Capitol has the effect of expressing an inherent government preference for Judeo-Christian religions over non-Judeo-Christian religions.

Amici include non-profit organizations and worship communities in Hindu,[3] Jain,[4] Buddhist[5] and other non-Judeo-Christian traditions[6] (collectively, the "Non-Judeo-Christian Religions"). Collectively, they reflect the religious sentiments of millions of Americans, including some of the fastest growing religious groups in the United States.

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1. Consent from Respondent for the filing of this brief is being filed contemporaneously herewith. Consent from Petitioner is already on file with the Court. Pursuant to Supreme Court Rule 37.6, *Amici* state that no part of this brief was authored by counsel for any party and further state that no person, other than *Amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

2. Hereinafter referred to as the "Ten Commendments Monument" or the "Monument."

3. The following *Amici* are devoted to Hinduism: The Hindu American Foundation; Arsha Vidya Pitham; Arya Samaj of Michigan; The Hindu International Council Against Defamation; Hindu University of America, Inc.; Navya Shastra; and Saiva Siddhanta Church.

4. *Amicus*, The Federation of Jain Associations in North America, is devoted to Jainism.

5. *Amicus*, Dr. Robert A.F. Thurman, is a world-renowned Buddhist scholar and Professor of Indo-Tibetan Studies at Columbia University.

6. *Amicus*, The Interfaith Freedom Foundation, represents Muslims, Sikhs, Hindus, Buddhists, Jews and other religious minorities.

Amici strive to promote the teachings of their respective faiths and to represent their religions in dealings with others. A listing of, and further information about, the *Amici* is provided in the Appendix. Each *Amicus* is well situated to assist the Court in understanding the viewpoint of non-Judeo-Christians. Each represents people whose theologies differ in profound respects from one or more of the Commandments and with the concept of "law" as divine injunction that the Decalogue reflects. Because their religious traditions are not Judeo-Christian, *Amici* provide a unique perspective — albeit one shared by millions of Americans — on the effect of the Ten Commandments monument on non-Judeo-Christians, and why it should be found to violate the Establishment Clause under this Court's First Amendment jurisprudence.

SUMMARY OF THE ARGUMENT

The maintenance of the Ten Commandments Monument on the grounds of the Texas State Capitol violates the Establishment Clause because the Monument is inherently religious, serves no historic purpose, and does not lose its religious character through juxtaposition with secular images. It depicts the Ten Commandments, a cornerstone of Judeo-Christian theology, in the traditional shape of the "Biblical Stones." Non-Judeo-Christians, including *Amici*, who do not adhere to the religious views that the Ten Commandments either state or symbolize cannot fail to perceive the placement of such a monument on the grounds of the Texas Capitol as an endorsement of Judeo-Christian beliefs over their own. The maintenance of the Monument therefore has the primary effect of advancing the Judeo-Christian beliefs to which a majority of Texans subscribe.

In reaching a contrary conclusion, the lower courts committed two principal errors. First, they concluded that the Ten Commandments Monument was "non-sectarian" simply because it favored no Judeo-Christian sect or denomination over any other. The courts below completely ignored the effect of the Ten Commandments Monument on non-Judeo-Christians,

whose beliefs regarding the nature of God and the relationship between man and God differ greatly from those enshrined in the Monument and for whom the Monument is clearly and unavoidably "sectarian." By ignoring the effect of the Monument on non-Judeo-Christians, they disregarded the requirements of this Court's Establishment Clause jurisprudence.

Second, the lower courts relied heavily on the forty years the Monument stood without challenge on the grounds of the Texas Capitol. The Establishment Clause is a bedrock constitutional limitation on the power of government and a violation of that limitation should not be countenanced simply because no one has complained for over forty years. Many of this Court's Establishment Clause decisions struck down state-sponsored religious practices — mandatory school prayer, for example — that had been observed far longer than forty years. Moreover, the inference drawn by the lower courts that the absence of complaint evidences the inoffensiveness of the Monument overlooks the historically tiny population of non-Judeo-Christians in Texas — a population that has reached significant numbers only in recent years. With the recent increase of religious diversity, in both Texas and the nation as a whole, comes a host of Establishment Clause issues that would never before have come to the fore. The Fifth Circuit's reliance on the historical absence of challenge during a period of much greater religious homogeneity effectively allowed majoritarianism to trump Establishment Clause requirements.

Amici respectfully submit that the lower courts reached the wrong conclusion here in part because they failed to properly consider the effect of the Ten Commandments Monument on those who do not adhere to Judeo-Christian religions. *Amici* urge this Court to rectify that mistake.

INTRODUCTION AND BACKGROUND

The District Court began its opinion with an 1892 quotation from Rudyard Kipling: "Ship me somewhere east of Suez, where the best is like the worst. Where there a'n't no

Ten Commandments, an' a man can raise a thirst."[7] The District Court failed to recognize that the world is smaller now, and there are many people in the Western District of Texas — and millions in the United States — for whom "there a'n't no Ten Commandments." The District Court also failed to recognize that allowing the Ten Commandments Monument to stand on the Texas Capitol grounds affects those people in ways that the majority, for whom the Ten Commandments are powerful (or at least inoffensive) symbols of religious faith, will never experience.

The District Court and the Fifth Circuit should have considered, under longstanding Establishment Clause jurisprudence, that many of these people would perceive the Ten Commandments Monument as endorsing a privileged or preferred status for Judeo-Christian religions over other religions, particularly in a State such as Texas, where a large majority of the population practice the Christian or Jewish faiths. The lower courts also should have considered that the Monument would convey to such religious minorities that, despite the promise of equal status under the laws of the United States and the State of Texas, they remain in fundamental ways political outsiders. *Amici* respectfully submit that the failure of the District Court and the Fifth Circuit to consider any perspective other than that of persons steeped in the tradition of the Ten Commandments was error, and urge this court not to make the same mistake.

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7. *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 U.S. Dist. LEXIS 26709, at *1 (W.D. Tex. Oct. 2, 2002) (quoting Rudyard Kipling, *Mandalay*, *in* Barrack-Room Ballads (1892)) [hereinafter "District Court Opinion"].

The Ten Commandments Constitute And Symbolize Fundamental Religious Precepts Concerning The Relationship Between Human Beings And The Judeo-Christian God — Precepts To Which Millions Of Americans Do Not Ascribe

Amici comprise organizations that represent adherents to major world religions: Hindus, Buddhists and Jains.[8] Each of these Non-Judeo-Christian Religions has the utmost respect for Judaism and Christianity and their ethical teachings. But these Non-Judeo-Christian Religions do not subscribe to traditional Judeo-Christian beliefs governing the nature of God and the relationship among human beings and God. A central symbol in the Judeo-Christian world for that relationship is the Ten Commandments. The display of this fundamental symbol of Judeo-Christian beliefs by the State of Texas in the form of a monument on the grounds of the Texas Capitol speaks to *Amici* and their fellow believers differently than it does to Christians and Jews for whom the symbolism of the Decalogue is both familiar and true.

To members of non-Judeo-Christian religions, the Ten Commandments do not merely recite non-controversial ethical maxims; several Commandments (e.g., the first, second and third) address the forms and objects of religious worship.[9]

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8. *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting) (major religions include, among others, Hinduism and Buddhism).

9. The relevant text of the Ten Commandments Monument at issue follows, with bracketed numbers added for ease of reference:

> [1] I AM the LORD thy God. Thou shalt have no other gods before me. Thou shalt not make to thyself any graven images. [2] Thou shalt not take the Name of the Lord thy God in vain. [3] Remember the Sabbath day, to keep it holy. [4] Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee. [5] Thou shalt not kill. [6] Thou shalt not commit adultery. [7] Thou shalt not steal. [8] Thou shalt not bear false witness against thy

(Cont'd)

Moreover, the Decalogue symbolizes a theology that is fundamentally at odds with the theology of the Non-Judeo-Christian Religions. The manner in which the Decalogue was provided to human beings, as described in the Bible,[10] reflects a particular view of the relationship between the divine and human beings. Law, under this view, is not the result of rational deliberation by human beings in furtherance of the public good, but rather the product of direct, divine command. The substance of the Ten Commandments, far from being universal, is expressly predicated on the existence of one very specific god, the Judeo-Christian God, and no other: "I AM the LORD thy God. Thou shalt have no other gods before me." The Ten Commandments symbolize a particular religious perspective, that of Judeo-Christians and not that of *Amici* or their co-religionists.

The fundamental precepts of the Non-Judeo-Christian Religions directly conflict with the Ten Commandments Monument and what it symbolizes. To *Amici*, placement of the six-foot-high, three-foot-wide Ten Commandments Monument at the center of political and legal power in the State of Texas — its Capitol — signifies state endorsement of and preference for Judeo-Christian religions followed by a majority of Texans over non-Judeo-Christian religions. Thus, the Ten Commandments Monument breached the "wall of separation between church and State" — precisely what the Establishment Clause was intended to protect against.[11]

(Cont'd)
neighbor. [9] Thou shalt not covet thy neighbor's house. [10] Thou shalt not covet thy neighbor's wife nor his manservant, nor his maid servant, nor his cattle, nor anything that is thy neighbors.

See Appendix C to the petition for Certiorari (photograph of the Monument).

10. The story of how human beings received the Covenant from God appears in *Exodus,* 19:1-34:35, and *Deuteronomy,* 5:1-33 & 9:7-10:11.

11. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting (Cont'd)

Background On The Non-Judeo-Christian Religions And How Their Theologies Conflict With The Religious Precepts Set Forth On The Ten Commandments Monument[12]

The Non-Judeo-Christian Religions represented by *Amici* include some of the oldest and most widely practiced religions in the world. More than one billion people worldwide adhere to these religions. Millions of people in the United States practice these religions, which are among the fastest growing in the country.

Followers of the Non-Judeo-Christian Religions did not begin to arrive in this country in appreciable numbers until about 1975. They came to the United States, like many generations of immigrants before them, seeking religious and political liberty and better lives for themselves and their families. Recognizing their religious minority status, they nevertheless expected to find a nation in which the Constitution guaranteed that Government would not favor one religion over another. In the eyes of the Non-Judeo-Christian Religions, the Ten Commandments Monument is inconsistent with this Constitutional guarantee.

1. *Hinduism.* Hinduism dates as far back as 5000 B.C.E.[13] Worldwide, there are over 800 million Hindus.[14] There are an estimated 766,000 to 1,285,000 Hindus in the United States,[15]

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with approval Thomas Jefferson, *Letter to the Danbury Baptist Association* (1802), *reprinted in Thomas Jefferson: Writings* at 510 (Merrill D. Peterson ed., 1984)).

12. A complete description of Hinduism, Buddhism and Jainism, and the many schools of thought of each of these religions that have emerged over their long histories, is beyond the scope of this brief.

13. J. Gordon Melton, *Encyclopedia of American Religions* 195 (Jolen Marya Gedridge ed., 7th ed. 2003).

14. *The Oxford Dictionary of World Religions* 430 (John Bowker ed., 1997).

15. Estimates of the number of Hindus in the United States vary greatly. 2003 U.S. Census, *at http://www.census.gov/prod/2004pubs/* (Cont'd)

more than triple the number in 1990.[16] The number of Hindu *mandirs* (places of worship) in the United States has grown accordingly, with as many as 700 *mandirs* in the United States, forty in Texas, and five in the Austin area alone.[17]

Several core aspects of Hindu theology directly conflict with the precepts set forth on the Ten Commandments Monument, and with the religious anthropology that the Decalogue symbolizes, with the result that a Hindu viewing the Ten Commandments Monument would perceive the state as preferring or endorsing Judeo-Christian beliefs at variance with his or her own.

Hinduism propounds a theology of panentheistic monotheism, recognizing that God can be called many names and may take many forms, and that the means or ways to

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03statab/pop.pdf, at Table 79 (last visited Dec. 12, 2004) (estimating 766,000 Hindus in the United States in 2001) (citing American Religious Identification Survey, *at http://www.gc.cuny.edu/studies/key_findings.htm*, at Exhibit 1 (2001) (last visited Dec.12, 2004) [hereinafter "ARIS"]); *see also* The Harvard Pluralism Project: World Religions in America at Harvard University, *at http://www.pluralism.org/resources/statistics/tradition.php#Hinduism* (last visited Dec. 12, 2004) (citing various sources estimating 1,032,000 to 1,285,000 Hindus in the United States as of 2000) [hereinafter "The Harvard Pluralism Project"]. *See also*, Satguru Sivaya Subramuniyaswami, *Dancing With Siva: Hinduism's Contemporary Catechism*, xxii-xxiii (5th ed. 1999) (estimating two million Hindus in the United States as of July 1997).

16. According to the Census, between 1990 and 2001 the number of Hindus grew from 227,000 to 766,000. 2003 U.S. Census, *at http://www.census.gov/prod/2004pubs/03statab/pop.pdf*, at Table 79 (last visited Dec. 12, 2004) (citing ARIS).

17. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.phm* (last visited Dec. 12, 2004). One *mandir* in the Austin area, Barasana Dham, has membership of over 1,000 families. *Id. at http://www.pluralism.org/research/profiles/display.php?profile=72430* (last visited Dec. 12, 2004).

salvation are many.[18] Hindu theology does not place proscriptions on how to pray, and each person may choose which form of God to pray to on his or her own path to self-realization. Moreover, Hindus do not conceive of God as a specific, single entity separate from other living things, in stark contrast to the portrayal of the God who delivered the Ten Commandments in *Exodus*. Rather, for Hindus, God is omnipresent (*anantam*) and within all living things.[19] Thus, Hindus cannot reconcile their non-dualistic teachings with the very First Commandment, which mandates the exclusion of all divine manifestations other than the Judeo-Christian God. For the same reason, the teachings of Hinduism cannot be squared with the reference to "the Lord thy God" in the Fourth Commandment.

Nor can Hindus accept the First Commandment's prohibition against "graven images." The use of *murtis* (sacred representations of God in any of God's various forms) is central to the practice of the religion for virtually all Hindus.[20] These consecrated images represent the presence of God and help devotees offer their devotion to God.[21]

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18. This concept is known in Sanskrit as *sama-darshinah*, or "equal vision." *The Holy Geeta*, 313-14, 5:18 (Swami Chinmayananda cmt., trans., n.d.) ("Sages look with an equal eye upon a BRAHMANA endowed with learning and humility, on a cow, on an elephant, and even a dog and an outcaste." Commentary stating in part, "Everywhere [God] realises the presence of the same Truth, whatever be the container."); *see also id.* at 230, 5:2 ("[I]n whatever way men approach Me, even so do I reward them; My path do men tread in all ways. . . .").

19. *Id.* at 230.

20. For example, Sri Pramukh Swami Maharaj of the Bochasanwasi Shri Ashar Purushottam Sanstha propounded prayers involving *murtis* as one of the defining aspects of Hinduism. *See* Bochasanwasi Shri Akshar Purushottam Swaminarayan Sanstha for Kids (BAPS), *at http://kids.swaminarayan.org/thingstoknow/nityapuja.htm* (last visited Dec. 12, 2004).

21. This is not to say that Hindus worship *murtis*. The idea that Hindus "worship idols" is a very common misconception. Hindus do not believe that the *murti* in a *mandir* or home is actually the Divine

(Cont'd)

Additionally, Hindu theology does not proscribe the time or manner of prayer to God.[22] Hinduism teaches that God, the one Supreme Being, is omnipotent (*sarva-shaktitva*) and need not rest. For example, Hindu philosophy holds that God created the universe with a single inhalation.[23] Hindus feel no compulsion to refrain from work or other activities on any particular holy day of the week. The concept of six days of creation and a seventh day for rest, the Sabbath, is absent from Hindu theology. The Third Commandment's directive on the Texas Monument to "[r]emember the Sabbath Day, to keep it holy" is alien to Hinduism.

2. *Buddhism.* Buddhism was established around 600 B.C.E. Over 372 million people practice some form of Buddhism worldwide.[24] Buddhism is rapidly expanding in the United

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Being itself. Hindus fully understand that the Divine itself is much greater than the physical image. The misconception that Hindus worship idols has been perpetuated for over 500 years, and continues to date. For example, in 2004, Orthodox Jewish Rabbis in New York and Israel forbade the use of Indian hair in wigs because of the misconception that Hindus worship idols. *See Daniel J. Wakin, Rabbis' Rules and Indian Wigs Stir Crisis in Orthodox Brooklyn*, N.Y. Times, May 14, 2004, *available at* http://www.nytimes.com.

22. *The Holy Geeta*, *supra*, at 449, 7:21 ("Whatsoever form any devotee desires to worship with faith — that (same) faith of his I make (firm and) unflinching." Commentary stating in part, ". . . the Common Truth that holds together the multiple universe of names and forms." "It is very well-known that, all men do not worship at the same altar.").

23. *The Brhadaranyaka Upanishad* 251, 2:4:10 (Sankaracarya cmt., Swami Madhavananda trans., 1975) (Commentary stating in part, "[i]t is the eternally composed and already existent Vedas that are manifested like a man's breath — without any thought or effort on [H]is part"); *The Holy Geeta*, *supra*, at 527-30, 9:7-9 (explaining that creation is a continuous and cyclical process, which takes no effort on the part of God).

24. *The World Almanac and Book of Facts 2005* 734 (William A. McGeveran, Jr. et al. eds., 2005) (providing figures for mid-2003) (citing *Encyclopedia Britannica Book of the Year 2004*).

States, with as many as 2.9 million Buddhists in North America[25] and over 2,000 Buddhist centers in the United States, including over 100 in Texas.[26]

Buddhism traces its roots to the spiritual quest of a young man named Siddhartha Gautama.[27] After an extended quest for enlightenment, Siddharta experienced a spiritual revelation and was transformed into the "Buddha," which means "the enlightened one." As described by *Amicus*, Dr. Robert A.F. Thurman, one of the world's foremost Buddhist scholars, the Buddha's enlightenment did not have to do with God. Rather: "The Buddha's enlightenment was . . . a human being's direct, exact and comprehensive experience of the final nature and total structure of reality."[28] This attainment of understanding and experience of the ultimate truth, or enlightenment, is the goal of all Buddhists.[29]

The fact that Siddhartha, a human being, achieved "enlightenment" and became the Buddha on his own — without the intervention of or direction from God — is foundational for every form of Buddhism.[30] "Unlike the religions of Middle Eastern origin the idea of an almighty god does not play a role in Buddhism."[31] The conception of God, or the notion of

25. The Harvard Pluralism Project *at http://www.pluralism.org/resources/statistics/tradition.php#Buddhism* (last visited Dec. 12, 2004) (citing various sources); *The World Almanac and Book of Facts 2005*, *supra*, at 731 (providing figures for mid-2003) (citing *Encyclopedia Britannica Book of the Year 2004*).

26. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

27. Richard H. Seager, *Buddhism in America* 12-13 (1999).

28. Robert A.F. Thurman, *Essential Tibetan Buddhism* 9 (1995).

29. The Staff of the Nanzan Institute, *Buddhist Spirituality: Indian, Southeast Asian, Tibetan, and Early Chinese* xiii (Takeuchi Yoshinori et al. eds., 1994).

30. *See* H. Wolfgang Schumann, *Buddhism: An Outline of its Teachings and Schools*, 169 (George Fenerstein trans., 1973); *see also* 2 *The Encyclopedia of Religion* 337 (Mircea Eliade ed., 1987).

31. *Schumann*, *supra*, at 169.

worshipping creator gods, is considered an *obstacle* to the enlightenment sought by Buddhists.[32]

Thus, Buddhists do not accept the basic premise of the Ten Commandments, i.e., that a separate divine entity has handed down Commandments as a king might set rules for his subjects. The notion of "law" as the result of God's command to human beings, as symbolized by the Decalogue, is completely alien to Buddhism. Nor do Buddhists accept that such a divine entity ordained either the right relationship between human beings and God (Commandments 1-3) or among human beings (Commandments 4-10). This highlights why a Buddhist viewing the Ten Commandments Monument would perceive the state as preferring or endorsing Judeo-Christian beliefs.

3. *Jainism.* Jainism has been recognized as a distinct religion for over 2500 years.[33] There are an estimated 4.4 million Jains worldwide[34] with approximately 75,000 in the United States.[35] The number of Jain temples throughout the country is growing quickly.[36] Texas has five Jain centers or temples[37] and

32. Donald S. Lopez, Jr., *The Story of Buddhism* 34 (2001) (the Buddha warned his disciples that contemplating "God" or "a creator" would lead them into "a jungle, a wilderness, a puppet-show, a writing and a fetter, coupled with misery, ruin, despair, and agony").

33. Melton, *supra*, at 199.

34. *The World Almanac and Book of Facts 2005*, *supra*, at 734.

35. The Harvard Pluralism Project, *at http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004).

36. The Harvard Pluralism Project, *at http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004) (quoting Edwin S. Gaustad et al., *New Historical Atlas of Religion in America* 272 (2000), which states there were thirty-four Jain temples in the United States in 1987 and sixty by the mid-1990s). Currently, The Harvard Pluralism Project lists eighty-nine Jain temples throughout the United States. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

37. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

one of the larger Jain populations in the United States.[38]

The concept of *Ahimsa*, non-injury to all living beings, is the underlying philosophy of Jainism.[39] Jains thereby aspire to avoid all violence in "deed, in word, and in thought."[40] In Jainism, "God" is not a creator[41] but rather an enlightened teacher. This state of enlightenment is within each human being.[42] It is this aspect of Jainism that, like Buddhism, conflicts with the basic premise of the Ten Commandments, i.e., that God is a creator who has handed down Commandments defining relationships between humans and with God.

ARGUMENT

As demonstrated above, there are fundamental differences between the precepts set forth on the Ten Commandments Monument and Hindu, Buddhist and Jain teachings regarding the very essence of religion, i.e., the existence and/or nature of God and the relationship between human beings and God. To *Amici* and their co-religionists, the Ten Commandments Monument is not a list of universal ethical truisms or mere

38. The Harvard Pluralism Project, *at http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004) (quoting Edwin S. Gaustad et al., *New Historical Atlas of Religion in America* 272 (2000)).

39. *See* Int'l Religious Found., *World Scripture: A Comparative Anthology of Sacred Texts* 13 (Andrew Wilson ed., 1991).

40. *Id.*

41. *The Oxford Dictionary of World Religions*, *supra*, at 487; Hiralal Rasikdas Kapadia, *A History of The Canonical Literature of the Jainas* 1 (Jitendra B. Shah ed., Shree Shwetambar Murtipujak Jaina Boarding (Ahmedabad), Series Vol. 17, 2000) ("According to Jainism, the universe is uncreated and unending").

42. Int'l Religious Found., *supra*, at 13 ("[E]ach person has within himself or herself the potential to realize perfection and become a *Paramatman*, a soul freed from all karmic fetters and able to reach the highest point in the universe."); Paul Dundas, *The Jains* 110-11 (John Hinnells ed., 2d ed. 2002) (Jainism "accepts the existence of a divine principle, the [*P*]*aramatman*, often in fact referred to as 'God' . . . existing in a potential state within all beings").

"ceremonial deism;" it is not a history lesson; it cannot be dismissed as a *de minimis* affront to the Non-Judeo-Christian Religions. Instead, it expresses concepts that conflict with the most basic beliefs of these religions.

The presence of the Ten Commandments Monument is unlikely to make those steeped in Judeo-Christian culture feel like outsiders. But to those who do not accept the religious authority of the Ten Commandments or the religious anthropology that they symbolize, the Monument leaves the unmistakable and unsettling impression that Texas, as a political body, has endorsed a particular set of religious beliefs and observances — those embraced by the majority of Texans — as the officially preferred beliefs. The setting of the Monument inherently, inescapably, signals to the religious minority of those practicing non-Judeo-Christian religions, often recent immigrants, that they are not merely religious outsiders, but unwelcome strangers to the political community as well.[43]

I. The Primary Effect Of The Ten Commandments Monument On Members Of The Non-Judeo-Christian Religions Is To Confirm That Texas Endorses The Particular Majority Religious View Reflected In The Monument

The Establishment Clause undergirds our increasingly pluralistic society. Waves of immigrants — Christians of all denominations, Jews, Muslims, Hindus, Buddhists, Jains, Sikhs, Zoroastrians and others — have come to this country with the expectation that they will find the freedom to worship in their

43. The presence of the Ten Commandments in the symbolic and administrative heart of the Texas political community unmistakably conveys that the government of Texas endorses the listed beliefs. The grounds of the Texas Capitol are not, like the grounds surrounding the Ohio statehouse, a legislatively created public forum. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757 (1995). To the contrary, no monument can be displayed on the grounds of the Texas Capitol without explicit government approval and none of the other seventeen monuments on the grounds has anything but a secular message.

own way without becoming a political outsider as a consequence of doing so.

The Establishment Clause is phrased as an absolute: "Congress shall make no law respecting an establishment of religion. . . ." It admits no exceptions for majority sentiment, historical inertia or administrative expedience. It contains no sunset provision, limitations period or grandfather clause.

The Firth Circuit's ruling was in error. The Ten Commandments Monument violates the Establishment Clause under the facts of this case, i.e., placement in the Texas Capitol of a central symbol of Judeo-Christian beliefs, a religious symbol that by its nature, history and content reflects fundamental differences with *Amici's* non-Judeo-Christian theology. The Fifth Circuit declared the text on the Ten Commandments Monument to be "non-sectarian"[44] as the text did not favor one set of Judeo-Christian beliefs over another. But the text and the Monument plainly favor Judeo-Christian beliefs over other religious beliefs. For practitioners of non-Judeo-Christian faiths, the Ten Commandments Monument is manifestly sectarian. Its presence on the grounds of the Texas Capitol is perceived by reasonable non-Judeo-Christian observers as an inherently religious symbol that cannot be divorced from its overtly Judeo-Christian nature and history. The Fifth Circuit's ruling was error and should be reversed.

A. The Monument Runs Afoul Of The "Effect" Prong Of The Court's *Lemon* Test, Which The Lower Courts Misapplied By Focusing Solely On The Effect Of The Monument On Those Who Agreed With Its Teachings And Overt Religious Symbolism

The lower courts applied this Court's *Lemon* test to determine whether the Ten Commandments Monument violates the Establishment Clause. Under the *Lemon* test, the Court

44. *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003) (describing the Monument as having "a large panel display[ing] a nonsectarian version of the text of the Commandments") [hereinafter "5th Cir. Opinion"].

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evaluates whether: (1) the challenged governmental activity has a secular purpose; (2) the activity's primary effect advances or inhibits religion; or (3) the activity fosters an excessive entanglement with religion.[45] A challenged activity that does not meet the standard for any one of these prongs violates the Establishment Clause.[46]

The parties stipulated that the Ten Commandments Monument did not violate the "entanglement" prong, leaving only the "purpose" and "effect" prongs to be evaluated. Here, we focus on the "effect" of the Ten Commandments Monument and the reasonable perception that it symbolizes state endorsement of the sectarian views expressed by it. The lower courts recognized that this Court has refined the effect prong, interpreting the First Amendment to prohibit government action that has the purpose or effect of endorsing or disapproving of religion.[47] A display endorses a religion when it "convey[s] or attempts[s] to convey a message that religion or a particular religious belief is favored or preferred."[48]

In analyzing the "effect" of government activity and whether a particular governmental action may be said to "endorse" a particular religious view, this Court has looked at the effect on a reasonable observer.[49] Most significant for this case, this Court has been careful to ensure that the reasonable observer include the views of both the believer and the non-believer, the majority and the minority.[50]

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45. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

46. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

47. District Court Opinion, 2002 U.S. Dist. LEXIS 26709, at *16; 5th Cir. Opinion, 351 F.3d at 178; *see County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 592-93 (1989).

48. *Allegheny*, 492 U.S. at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

49. *Id.* at 599-600; *see id.* at 630-31 (O'Connor, J., concurring)

50. *See id.* at 597 (The question is whether the "challenged government action is sufficiently likely to be perceived by adherents of

(Cont'd)

In the case before the Court, *Amici* represent religious minorities in Texas and the nation. Only by taking into account the views of the faiths that *Amici* represent can the "reasonable observer" standard reflect, as it must, the full range of religious sensibility that the First Amendment protects from hostile government endorsement.[51]

That the religiously symbolic force of the Ten Commandments Monument may have been diluted to the point that it is acceptable in a vaguely non-denominational way to the Judeo-Christian majority in Texas does not matter because the religious diversity of Texas is far broader. If it did matter, then the Establishment Clause would be marginalized. It would permit the Judeo-Christian majority to establish some "least common denominator" of their religious beliefs over the non-Judeo-Christian minority. It is therefore critical that the reasonable observer standard include the views and sensibilities of those of faiths that lie outside the local majority.

The lower courts appear to have evaluated the message of the Ten Commandments Monument only from the perspective of those who agree with its general precepts. The Fifth Circuit described the Monument as containing a "non-sectarian" version of the Ten Commandments. This description only applies when the "reasonable observer" is deemed to belong to a Christian or Jewish "sect." To a non-Judeo-Christian believer, the Decalogue cannot fail to be the "sectarian" symbol of another, quite different, sect.[52]

(Cont'd)
the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices.") (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305-06 (2000) (holding that the First Amendment does not permit majority vote to neutralize message of state endorsement).

51. *Allegheny*, 492 U.S. at 597; *see Santa Fe*, 530 U.S. at 305-06.

52. Followers of the Non-Judeo-Christian Religions might have

(Cont'd)

The lower courts erred by failing to consider the perspective of *Amici*, for whom the Ten Commandments is not simply a set of "non-sectarian" platitudes, and who constitute an ever growing portion of the public. By only considering the perspectives of those to whom the Ten Commandments are a symbol familiar since childhood, the Fifth Circuit minimized the impact of that symbol on those for whom the Ten Commandments constitutes an alien set of largely religious directives.

Had the lower courts properly considered the perspectives of the significant and growing community of Hindus, Buddhists, Jains and other non-Judeo-Christian adherents, the outcome of the effect test would have been quite different. Consideration of the perspective of a non-Judeo-Christian observer, and the primary effect on such an observer, would lead to the inescapable conclusion that the Ten Commandments Monument endorses Judeo-Christian religious beliefs and precepts and has a primary effect of advancing Judeo-Christian religions and/or inhibiting non-Judeo-Christian religions.

B. The Effect Of The Ten Commandments Monument On Followers Of The Non-Judeo-Christian Religions Is To Signal An Endorsement Of Particular Religious Views

The effect of placing a six-foot monument of a central Judeo-Christian religious text at the seat of state government is to underscore the government's endorsement of the particular

(Cont'd)
perceived the monument differently were it surrounded by other examples of moral codes, such as the Buddhist Four Noble Truths and Eightfold Way To The Termination Of Suffering, which includes teachings on the attainment of enlightenment containing both secular and non-secular aspects, Schumann, *supra* at 65-68, and/or the Hindu Yamas and Niyamas, a code of conduct which includes ten restraints and ten religious practices to build character, the foundation for happiness and spiritual unfoldment, Satguru Sivaya Subramuniyaswami, *Dancing with Siva: Hinduism's Contemporary Catechism* 187-89 (5th ed. 1999).

views espoused by that text. This Court has permitted explicitly religious conduct or speech in governmental settings or at public events only when the context makes clear that the government is not endorsing the beliefs espoused in the speech. Thus, this Court permitted the display of a crèche in *Lynch* because the context demonstrated that the particular government display in question celebrated the secular, not religious, aspects of Christmas.[53] But, this Court struck down the display of a crèche in *Allegheny* because the display was simply religious without any significant secularizing influences.[54] Similarly, the Court permitted the display of a cross in *Capitol Square* because the location at issue was a "traditional public forum" and thus the reasonable observer would know that the government allowed private and unendorsed speech at that location, even though it was close to the seat of government.[55] By contrast, this Court struck down the display of the Ten Commandments in *Stone* because the context (displaying the Ten Commandments in public school classrooms) had the effect of state endorsement of the religious beliefs displayed.[56] Finally, this Court held that the Establishment Clause did not prevent a school from allowing a religious club to meet on school grounds after school because the school allowed many groups to use the grounds, thus not endorsing the religious message.[57] By the same token, the Court held constitutionally infirm a school practice of allowing "non-sectarian" prayers at both high school graduations[58] and football games[59] because the context of having a single perspective presented at such events conveyed a message of government endorsement. Like the conduct struck down in

53. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).
54. *Allegheny*, 492 U.S. at 598.
55. *Capitol Square*, 515 U.S. at 780-81.
56. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).
57. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001).
58. *Lee v. Weisman*, 505 U.S. 577, 594 (1992).
59. *Santa Fe*, 530 U.S. at 305.

Allegheny, *Stone*, *Lee* and *Santa Fe*, the display of the Ten Commandments at the Texas Capitol violates the Establishment Clause because as displayed, it has the effect of endorsing a religious message without secularizing influences.

The inference of government endorsement is particularly strong here because the Ten Commandments undoubtedly reflect the religious views of the majority of Texans. An adherent of a non-Judeo-Christian faith in Texas for any length of time cannot help but be aware of his or her status as part of a religious minority. Texas is part of the "Bible Belt." For the State of Texas to place on its Capitol grounds a monument to one of the central symbols of the religious majority, and have it be the only outdoor monument with explicitly religious symbols, is in itself powerfully suggestive of official endorsement.[60]

It is important to emphasize that *Amici* do not take issue with the specific ethical teachings of the Ten Commandments. *Amici* share with all people of good faith the belief that human beings should not kill each other, should not steal from each

60. *See* 5th Cir. Opinion, 351 F.3d at 175-76. The following additional factors bolster the endorsement effect of the Ten Commandments Monument on the Non-Judeo-Christian Religions: (1) the Monument is on the State Capitol grounds; (2) the Monument is owned and maintained by the state; (3) the Texas Capitol grounds are not a public forum; (4) there is no disclaimer of the explicitly religious message on the Monument; (5) the Monument is in the traditional shape and form of the Biblical Stones and contains numerous Judeo-Christian symbols such as the Chi Rho, Stars of David, the All-Seeing Eye in an equilateral triangle and ancient Hebrew text in tablets; (6) none of the other sixteen monuments on the grounds of the Texas Capitol are religious, and many, if not all, reflect government endorsed speech; and (7) as the District Court recognized, the context of the Monument does not suggest that it is part of a display regarding the history of lawmaking. In short, the context of the Monument does nothing to dispel its overwhelmingly religious impact, particularly when viewed by those outside of the Judeo-Christian context. In terms of context, the Ten Commandments Monument is similar to the stand-alone crèche this Court struck down in *Allegheny*, not the contextualized and secularized Christmas display that passed constitutional muster in *Lynch*.

other, and should honor their parents. The Ten Commandments Monument is not presented, however, as a mere set of universally shared ethical or legal norms. Nor is it presented as a lesson in history. Rather, it grounds the source of law in a specific religious tradition, the imposition of divine commandments described in *Exodus*. The Monument's message cannot be divorced by a reasonable viewer from its biblical origins and its religious symbolism and connotations. Such a monument unmistakably conveys the officially preferred status of the specific religious traditions that accept the *Exodus* story as holy writ.

The Ten Commandments are an important religious symbol, a symbol that conveys a religious message very different from the religious views of the followers of the Non-Judeo-Christian Religions. The effect of non-Judeo-Christians having to confront this religious symbol in the seat of government should have been part of the Fifth Circuit's reasonable observer analysis. Failure to consider these issues is reversible error and consideration of these issues compels a finding that the Monument violates the Establishment Clause.

C. The Placement And Religious Content Of The Ten Commandments Monument Informs Non-Judeo-Christians That They Are Political Outsiders

The Ten Commandments Monument is located adjacent to the Texas Capitol building on the State Capitol grounds. It is next to a public sidewalk and is on a "direct line between the legislative chambers, the executive office of the governor, and the Supreme Court building."[61] A reasonable observer walking by the Ten Commandments Monument would understand that the State permitted the Monument to be placed on the Capitol grounds and pays for its maintenance. Thus, a reasonable observer would perceive the State of Texas as endorsing the Monument, an undeniably religious display.

The Fifth Circuit suggests that the religious effect of the Ten Commandments Monument is diluted by an inscription

61. 5th Cir. Opinion, 351 F.3d at 181.

above the bench in the Supreme Court building, the Confederate Seal, the Mexican Flag and the Seal of Mexico, all found somewhere on the Texas Capitol grounds.[62] However, each of the items described by the Fifth Circuit is no more than ceremonial deism and has a direct relation to Texas. In contrast, the Ten Commandments Monument is unique. It is not ceremonial deism; it is not related to the history of Texas; and, as the District Court ruled, it did not form the basis of Texas law.[63]

Thus, the Ten Commandments Monument is the only monument[64] on the Texas Capitol grounds rooted in the history and beliefs of a specific religious tradition, and having no relation to the history of Texas. A non-Judeo-Christian, viewing the Ten Commandments Monument in this context, which includes its presence in a heavily Christian state, would understand that those who ascribe to the Ten Commandments are insiders, and those who do not are outsiders and disfavored members of the political community.[65] The primary effect of the Monument, taking into account the perspective of *Amici*, is to put the weight of the state behind an image underscoring the otherness of the *Amici*. The Fifth Circuit, by ignoring the perspective of non-Judeo-Christians, committed reversible error.

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62. *Id.* at 176, 180.

63. District Court Opinion, 2002 U.S. Dist. LEXIS 26709, at ** 15-16.

64. For a listing of the many artifacts on the Texas Capitol grounds, *see* 5th Cir. Opinion, 351 F.3d at 175-76.

65. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

II. The Ten Commandments Monument Violated The Establishment Clause Forty Years Ago And Continues To Do So Today

The Fifth Circuit's conclusions were based in significant part on the finding that the Ten Commandments Monument has stood on the grounds of the Texas Capitol for forty years without recorded complaint. This must mean, the Court reasoned, that reasonable observers do not view it as an endorsement of religious belief. This reasoning is fatally flawed.

Surely it cannot be the law of the land that those who would violate the Constitution need only do so in a way that their actions go unchallenged for an extended period of time. Such a rule would ensure that the most egregious constitutional violations could go unremedied. Moreover, such a rule ignores the specific historical reasons why the Ten Commandments Monument has not previously been challenged, at least by those represented by *Amici*.

Establishment Clause jurisprudence should not enshrine the historical views of the unchallenged majority, but should reflect the increasing and increasingly important religious diversity of the United States. As Justice Brennan stated:

> our religious composition makes us a vastly more diverse people than were our forefathers. . . . Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. In the face of such profound changes, practices which may have been objectionable to no one . . . may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.[66]

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66. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring) (striking down a more than fifty year-old statute requiring opening exercises in public schools that included Bible readings) (internal footnote and citation omitted).

A. The Passage Of Time Does Not Legitimize An Otherwise Improper Government Activity

The Establishment Clause analyses of the lower courts gave weight to the presence of the Ten Commandments Monument at the Texas Capitol without legal challenge since 1961,[67] suggesting that the passage of time estops challenges to the Ten Commandments Monument. Such reasoning would create a dangerous First Amendment precedent. Could a government suppress free speech, for example, and then defend itself on the basis of the prolonged absence of the speech it had succeeded in suppressing? Should governments feel emboldened to install majority-sponsored religious displays in the hopes that they can avoid minority group complaints for just long enough to defeat them? Fundamental liberties such as those set forth in the First Amendment should not be deemed casually waived or subject to arbitrary limitations periods.[68]

Since its erection in 1961, the Ten Commandments Monument has been an improper endorsement by Texas of Judeo-Christian religions in violation of the Establishment Clause. The Ten Commandments themselves have not lost or changed their meaning, symbolism or impact since 1961.[69] There

67. 5th Cir. Opinion, 351 F.3d at 181-82 (the length of time the Monument has been in place "adds force to the contention that the legislature had a secular purpose"; the "reasonable observer would perceive an historic plaque as less of an endorsement of religion"); *see* District Court Opinion, 2002 U.S. Dist. LEXIS 26709, at *19 ("it is noteworthy that the monument was in place for more than forty years before any individual or organization complained about it").

68. Like discrimination in education and voting, the passage of time does not legitimize an otherwise unconstitutional government activity.

69. The circumstances here are far different than those in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh* addressed prayers before legislative sessions, a practice with a "unique history" that is as old as the nation itself and which was engaged in by the Framers. *Id.* at 791. The Court took comfort that the practice was viewed by the Framers as (Cont'd)

is no basis for suggesting that State expression of the Ten Commandments is less an endorsement of religion now than previously. Indeed, given the increasingly pluralistic nature of Texas, like American society as a whole, the presence of the Ten Commandments is now *more* likely to be perceived as religious than before.[70]

That no individual or organization complained before Petitioner does not cure the ongoing Establishment Clause violation. In view of the history of the Non-Judeo-Christian Religions represented by *Amici*, it is not surprising that the followers of these religions had not openly complained.

B. The History Of *Amici* In Texas (And The United States) Explains Why Followers Of The Non-Judeo-Christian Religions Had Not Previously Openly Complained About The Ten Commandments Monument

The lower courts reasoned that if anyone had religious objections to the Ten Commandments Monument, someone would have raised them long before the instant action had been brought. This reasoning is flawed, however, because very few adherents of non-Judeo-Christian faiths were present in 1961 or for many years thereafter to voice any complaint. Texas cannot use its own historical lack of religious diversity to justify its

(Cont'd)
harmonizing religious views rather than supporting any particular one. Indeed, the process by which the chaplain in *Marsh* was selected and the prayers he delivered negated an intent by the Nebraska legislature to endorse a particular religion. Finally, the religious observance was brief and was addressed to a small group of adults who wielded state power, not to persons subjected to the exercise of state power, circumstances that mitigated the risk of religious indoctrination. These distinguishing factors are absent here, where the practice at issue is contemporary, comes with no explicit endorsement in words or deeds by the Framers, is overtly sectarian, is directed to the general public (including large numbers of visiting schoolchildren), not simply to the lawmakers themselves, and is on permanent display.

70. *See* Int'l Religious Found., *supra*, at 10.

continued sponsorship of the undeniably sectarian Ten Commandments Monument. The Fifth Circuit's reliance on the historical absence of debate elevates majoritarianism over Establishment Clause jurisprudence.

Until recently, the *Amici* were too small a minority in Texas to be expected to voice their objections to the Ten Commandments Monument. Hindus, Buddhists and Jains primarily immigrated to the United States from Asian countries after 1965.[71] Immigration from Asia was stunted during and after World War I because of a significant anti-Asian prejudice.[71] This bias led to the enactment of the Asian Exclusion Act of 1917,[72] which severely limited Asian immigration for a half century under a strict quota system. With the passage of the Immigration and Nationality Act of 1965, limitations on immigration to the United States were relaxed, and quotas from Asian countries were raised to the same level as European countries.[73] Nevertheless, it was some years before those immigrants could become citizens, further inhibiting their political voice. Accordingly, Hindu, Buddhist and Jain immigrants could not have been expected to openly challenge the Ten Commandments Monument in 1961.[74]

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71. Melton, *supra*, at 197-98.

72. Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917) (repealed 1952). The 1952 Act, although repealing the 1917 Asian Exclusion Act, retained the same restrictive quotas found in the 1917 Act. Immigration & Nationality Act of 1952, ch. 477, 66 Stat. 163 (1952) (amended 1965, 79 Stat. 911); *see also* Melton, *supra*, at 198.

73. Immigration & Nationality Act of 1952, ch. 477. 66 Stat. 163 (1952) (amended 1965, 79 Stat. 911); *see* Melton, *supra*, at 198.

74. The few non-Judeo-Christians who may have been present in Texas in 1961 may not have felt emboldened to challenge the Monument. Congress had not yet passed The Civil Rights Act of 1964 and the country would not see the first strong enforcement of civil rights laws for several years. The lower courts wrongly assumed that asserting an objection to the Monument in 1961 would have taken no more courage than it would today.

In recent years the number of Asian immigrants has been steadily rising and, not surprisingly, so has the number of followers of the *Amici's* religions. For example, according to the 2003 U.S. Census, the number of Hindus, Buddhists, and Jains in the United States approximately tripled from 648,000 in 1990 to 1,933,000 in 2001.[75] This trend is similar in Texas. For example, the first Hindu *mandir* in the nation was built in the late 1970s.[76] Today there are forty in Texas alone.[77] There are also currently over 100 Buddhist temples and five Jain temples in Texas.[78]

Finally, the Fifth Circuit's ruling is inconsistent with the history and purpose of the Establishment Clause. It was not lost on the Framers that the United States was created in large part by the emigrations of religious dissidents. The drafters of the Bill of Rights devised the Establishment Clause as a means of protecting the religious views of those who dissent or disagree by ensuring that state power would never throw its weight behind any religion or religion in general. As the population of the United States grows ever more religiously diverse, the original purpose of the Establishment Clause becomes ever more critical. The Ten Commandments Monument is sectarian and violates the Establishment Clause today, just as it did forty years ago. That it took forty years for religious pluralism to give rise to an

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75. 2003 U.S. Census, *at http://www.census.gov/prod/2004pubs/03statab/pop.pdf* at Table 79 (last visited Dec. 12, 2004) (finding that between 1990 and 2001, respectively, the number of Hindus grew from 227,000 to 766,000 and the number of Buddhists grew from 401,000 to 1,082,000); The Harvard Pluralism Project, *http://www.pluralism.org/resources/statistics/tradition.php#Jainism* (last visited Dec. 12, 2004) (the number of Jains grew from 20,000 to 75,000).

76. Thomas A. Tweed & Stephen Prothero, *Asian Religions in America: A Documentary History* 289 (1999).

77. The Harvard Pluralism Project, *at http://www.pluralism.org/directory/search.php* (last visited Dec. 12, 2004).

78. *Id.*

impetus to challenge Texas' actions is no defense. This is especially true with regard to followers of the Non-Judeo-Christian Religions represented by *Amici*.

CONCLUSION

The Ten Commandments Monument is a large granite monument in the traditional shape of the Biblical Stones engraved with a message from the Judeo-Christian God and sitting on the path to the seat of political power in a predominantly Christian state. The lower courts erred by failing to consider the effect of this Monument on non-Judeo-Christians, such as the followers of the religions represented by *Amici*. As set forth above, the Ten Commandments Monument sends the message to such non-Judeo-Christians that the State of Texas endorses Judeo-Christian religions and that Judeo-Christians are insiders while all others are outsiders. *Amici* urge this Court to consider such effects and conclude that the Ten Commandments Monument violates the Establishment Clause of the First Amendment.

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APPENDIX

LISTING AND DESCRIPTION OF AMICI

Hindu Organizations

- **Hindu American Foundation (HAF):** HAF is a non-partisan, non-profit organization committed to providing a voice for nearly two million Hindu Americans. HAF interacts with and educates government, media, think tanks, academia and the public about Hinduism and issues of concern to Hindus locally and globally. Promoting the Hindu and American ideals of understanding, tolerance and pluralism, HAF firmly opposes hate, discrimination, defamation and terror.

- **Arsha Vidya Pitham:** Arsha Vidya Pitham is a non-profit church in California and Pennsylvania with approximately 12,000 members. Arsha Vidya Pitham is committed to making Hindu culture, religion, and religious disciplines available to all Hindus and non-Hindus, as well as facilitating the in-depth study of Sanskrit language, the language of Hindu religious text and the traditional study of classical Indian disciplines. Arsha Vidya Pitham strives to be a place where one learns the knowledge imparted by the *Rishis* (great sages).

- **Arya Samaj of Michigan:** Arya Samaj of Michigan is a non-profit organization with about 2,000 followers in Michigan. Arya Samaj of Michigan strives to promote Hinduism and to follow the principles of the Arya Samaj.

Appendix

- **The Hindu International Council Against Defamation (HICAD):** HICAD is a non-profit organization dedicated to eliminating bias against Indian traditions while promoting diversity, pluralism and tolerance.

- **Hindu University of America, Inc.:** The Hindu University of America is a non-profit organization whose purpose is to provide learning, research and training in a broad spectrum of topics related to Vedic/Hindu culture, including religion, philosophy, and practices.

- **Navya Shastra:** Navya Shastra is a United States-based non-profit organization dedicated to fostering the spiritual equality of all Hindus. Navya Shastra has members in ten countries, including the United States.

- **Saiva Siddhanta Church:** Saiva Siddhanta Church is a non-profit church with 1,000 members. The mission of the church is to protect, preserve and promote the Saivite Hindu religion. Saiva Siddhanta Church also publishes Hinduism Today, which has a circulation of over 250,000.

Appendix

Jain Organizations

- **The Federation of Jain Associations in North America (JAINA):** JAINA is a non-profit umbrella organization of over sixty-two local Jain Associations in the United States and Canada, and represents most of the Jains in the United States. Among JAINA's objectives are to promote religious and educational activities related to the Jain religion, to develop better understanding of the Jain religion, and to promote charitable and humanitarian activities in North America and around the world.

Other Organizations Or Individuals

- **The Interfaith Freedom Foundation:** The Interfaith Freedom Foundation is a non-profit organization devoted to defending the constitutional rights of Muslims, Sikhs, Hindus, Buddhists, Jews and other religious minorities, including their right to practice their respective religions.

- **Dr. Robert A.F. Thurman:** Dr. Thurman is a world-renowned scholar, Professor of Indo-Tibetan Studies at Columbia University, and is the Director of Tibet House in New York City. He is also a former Tibetan Buddhist monk and a close personal friend of His Holiness the 14th Dalai Lama. Dr. Thurman is also an author and has lectured all over the world on the subject of Buddhism.

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WYOMING IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF THE AMICI STATES

The State of Indiana submits this brief on behalf of itself and 17 other *amici* states in support of Texas and the decision below upholding the constitutionality of Texas' Ten Commandments display. Texas' monument, like other existing and proposed Ten Commandments displays around the country, is a tribute to a seminal part of our Nation's history and civilization, particularly with respect to the rule of law. The Court's decision in this case, as well as its decision in *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693), will have a direct impact on the continued viability of thousands of government Ten Commandments monuments that have become fixtures of statehouse and courthouse lawns around the country, as well as on the permissibility of future or replacement displays.

Doubtless the ruling here will also have a substantial impact on other government commemorations of religious heritage. State and local governments frequently erect monuments, hang plaques, and maintain frescos and murals to celebrate local and national history and culture, including events and ideas rooted in religion. Such tributes remind citizens and newcomers alike of where we came from and what our forebears valued. It is not too much to say that, regardless of individual creed, such knowledge is critical to understanding who we are *now* as a people—as Americans, Texans, Kentuckians, Hoosiers, Alabamians or citizens of wherever we live.

The *amici* States thus have a compelling interest in defending their ability to commemorate all aspects of their heritage, from the battles to gain and preserve liberty, to the roots (religious or otherwise) of liberty, the rule of law, and other social values. The Court should uphold Texas' monument, as well as the display at issue in *McCreary County*, to ensure that religious heritage is not banished from the public square.

SUMMARY OF THE ARGUMENT

Throughout the United States, state and local governments have incorporated into their buildings, grounds and parks various displays, monuments, statues, paintings, and other artistic expressions that have both religious and secular meaning. These displays exist as a part of an overall education of the foundations of our governments and culture. Such displays are not intended to declare official religious doctrine, nor is anyone likely to mistake them for such. Our republic has a rich tradition of displaying representations of our religious heritage. Such displays are everywhere. Surely, no reasonable person could say that the cumulative effect of these displays has been to advance religion, to establish a church or religious orthodoxy, or to coerce individuals into espousing particular religious views. There is nothing about Ten Commandments displays, new or old, that threatens a tipping point of official religious sanction or indoctrination.

Using the secular purpose test to evaluate government displays of the Ten Commandments and other symbols of religious heritage has led to inconsistent, frustrating and ultimately inequitable results. Governments having substantially identical displays often see disparate outcomes simply because an official statement or the participation of clergy at a dedication ceremony years or decades earlier are adjudged in hindsight to have conveyed a purpose of advancing religion. It is especially objectionable that the inference of impropriety a court might draw under such circumstances can forever taint future displays in that jurisdiction, regardless of changes in public officials or the development of new secular purposes. The Establishment Clause surely does not require such results, and indeed many problems with the purpose test arise because it lacks a sound connection to Establishment Clause values.

The Court should discard the purpose test entirely, and at the very least clarify that an improper purpose at one time does not taint future displays. A better approach for evaluating government displays having both religious and secular meaning is to ask whether the display is actually coercive.

ARGUMENT

I. Texas' Monument Should Be Upheld As An Encomium To Heritage, Similar To Other Ubiquitous, Benign Government Tributes To Religious Roots

Texas' Ten Commandments monument, donated by the Fraternal Order of Eagles in 1961, is hardly unusual as a government tribute to a heritage with religious origins. Indeed, displaying monuments to history that also have religious meaning has a long and rich tradition in America at all levels of government. Without including such displays among representations of other cultural symbols and markers, governments would leave obvious, yawning gaps in their historical narratives. The Establishment Clause surely does not demand incomplete, censored or revisionist depictions of history.

1. Many state and local government buildings have erected Ten Commandments monuments donated by the Fraternal Order of Eagles. As explained in more detail in the *amicus* brief of Alabama and other states filed in *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693), during the 1950's and 1960's, the Eagles donated thousands of such monuments to state and local governments across the country. For decades there have also been many non-Eagles Ten Commandments displays on public lands around the country, some of which have only recently been subjected to litigation. *See, e.g., Modrovich v. Allegheny County*, 385 F.3d 397 (3d.

Cir. 2004); *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d. Cir. 2003).

The Supreme Court Chambers in the Minnesota State Capitol has a painting depicting Moses receiving the Ten Commandments. *See* Minn. Jud. Branch, Sup. Ct., *Minnesota Supreme Court*, *at* http://www.courts.state.mn.us/documents/CIO/otherResources/SupremeCourt.doc (last visited Dec. 6, 2004). Other pieces of art within the Minnesota State Capitol have religious themes as well, including a painting of Saint Anthony at Saint Anthony Falls. *See* Minn. State Capitol Bldg., *at* http://www.minnesotabound.com/visit/Capitol/(last visited Nov. 30, 2004). On the outside of the New York State Supreme Court building, there are nine full-sized statues, including Moses, Confucius, and Solon. A figure of Muhammad was included until the early 1950's when it was removed at the request of Muslim nations. Francis Morrone, *Statues and Civic Memory*, City J. (Summer 1999), *available at* http://www.cityjournal.org/html/9_3_urbanities_statues.html (last visited Nov. 30, 2004).

2. State and local governments also display monuments to culture that have a wide variety of other religious origins and references. Outside of Hawaii's State Capitol stands a statue of Father Damien deVeuster, a Belgian Catholic Priest who was the martyr of Kalawao, Moloka'i and who devoted his life to helping sufferers of Hansen's Disease (leprosy) before succumbing to the disease himself. *See* Hawaii.com, *Hawaii State Capitol Building*, *at* http://www.hawaii.com/visit/details.php?id=329&type=attractions (last visited Nov. 30, 2004). Honolulu's publicly owned Foster Botanical Garden includes a sculpture of a sitting Buddha. *See* Honolulu, *Foster Botanical Garden Master Plan*, *at* http:// www.co.honolulu.hi.us/parks/facility/foster/index1.htm (last visited Nov. 30, 2004). In Alaska, the Juneau Municipal Building features a mural based on the Tlingit religion's legend of the creation of

mankind. *See* TravelJuneau.com, *Juneau Downtown Area Map*, *at* http://www.traveljuneau.com/discover/maps/downtown/downloads/juneau.pdf (last visited Nov. 30, 2004); Pat Costello, Photo of the Mural on City Hall, Sept. 15, 2000, *at* http://www.juneauphotos.com/index.asp?r=605 (last visited Nov. 30, 2004).

Throughout California many crosses stand on public land. Sean Scully, *Ventura Faces Suit over Park's Cross*, Wash. Times, Apr. 14, 2003, *available at* http://www. papillonsartpalace.com/venrtura.htm (last visited Nov. 30, 2004). In recent years federal courts have ordered some to be removed, but many remain. *Id.* In Oroville, California, a Chinese Temple once used for worship sits in a city garden and is a California Registered Historical Landmark. *See* Oroville Parks and Trees Dep't, *Oroville Chinese Temple*, *at* http://www.cityoforoville.org/Parks/ChineseTempleHistory.html (last visited Nov. 30, 2004). Golden Gate Park features a statue of Buddha in its Japanese Tea Garden. *See* Inetours.com, Tour San Francisco, *The Japanese Tea Garden in San Francisco's Golden Gate Park*, *at* http://www.inetours.com/Pages/SNFbrhds/Japanese_Tea_Garden.html (last visited Nov. 30, 2004).

A Salt Lake City park, the Gilgal Garden, features many sculptures and stoneworks that reflect Church of Jesus Christ of the Latter Day Saints themes. Gilgal Garden, *History of Gilgal Garden*, *at* http://www.mediadivide.org/gilgal/history.html (last visited Dec. 7, 2004). In St. Louis' Forest Park stands both a Jewish First American Settlement Commemorative Monument and a St. Francis of Assisi Statue in memory of Harry Turner, one of the first automobile dealers in St. Louis. *See* St. Louis, Dep't of Parks, Recreation and Forestry, *St. Louis City Parks Ornamental Structures and Fountains*, *at* http://stlouis. missouri.org/citygov/parks/parks_div/facilities/ fountains.html (last visited Nov. 30, 2004). The Pennsylvania Capitol rotunda contains the treasured medallion

"Religion," and in the South Dakota Supreme Court, the mural "Mercy of the Law" depicts an angel guarding over the legal process. Francisco Pio Ruggiero, *State Capitols: Temples of Sovereignty* 140, 532 (2002).

3. As detailed in the *amicus* brief filed by Alabama and other states in the *McCreary County* case, several federal government buildings also display representations of the Ten Commandments, including some at the Supreme Court itself. Another notable federal courthouse depiction of Moses's role in American law is at the E. Barrett Prettyman courthouse in Washington D.C., where four large sculptures of historically significant lawgivers, including Moses, sit behind the bench in one of the courtrooms. *See* U.S. Dist. Ct., Dist. of Columbia, *History of E. Barrett Prettyman Federal Courthouse*, *at* http://www.dcd.us courts.gov/court-history.html (last visited Nov. 30, 2004). And, ironically, located over the bench in the very courtroom where a federal district court heard arguments concerning a proposed Indiana Statehouse lawn Ten Commandments monument is a mural depicting, among other things, a figure holding the Ten Commandments. *See* Sara Evans Barker, *The Rule of Law*, Traces of Ind. and Midwestern Hist., Summer 2003, at 4; *Ind. Civil Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842, 851-52 (S.D. Ind. 2000).

Federal buildings also display other religious symbols as tributes to our country's heritage. In the U.S. Capitol, for example, there is a stained glass window depicting George Washington praying. *See* Human Events Online, *Exclusive Photo Essay: God in the Temples of Government*, *at* http://www.humaneventsonline.com/article.php?id=2441 (last visited Nov. 30, 2004). The Capitol's artwork includes paintings of De Soto's discovery of the Mississippi River and his burial, both of which display religious symbols such as the crucifix. *See* Architect of the Capitol, *Works of Art in the Capitol Complex*, *at* http://www.aoc.gov/cc/cc_art.htm (last

visited November 30, 2004). The Capitol also displays statues of Jacques Marquette, a Jesuit missionary from the seventeenth century, Brigham Young, president of the Mormon Church during its western colonization, and Thomas Starr King, a nineteenth century Unitarian minister. *See id. at* http://www.aoc.gov/cc/art/nsh/index.cfm. Relief portraits of Moses, medieval pope Gregory IX, and Jewish theologian Maimonides are included among the Capitol's twenty-three portraits of lawgivers who are considered to have established the principles that underlie American law. *See id.* at http://www.aoc.gov/cc/art/lawgivers/lawgivers.cfm. And the Library of Congress displays religious paintings and Biblical quotations on its walls. *See* Human Events Online, *at* http://www.humaneventsonline.com/article.php?id=2441.

During the Great Depression the Public Works Administration built or repaired numerous historical sites reflecting religious themes. For example, the PWA restored a church and other buildings in Old Economy Village, a religious communal society founded by the Harmony Society in Pennsylvania, and today the village is a national historic landmark. *See* C.W. Short & R. Stanley-Brown, *Public Buildings, Architecture Under the Public Works Administration 1933 to 1939* 141 (1939); Old Economy Village, *at* http://www.oldeconomyvillage.org (last visited Nov. 30, 2004). The PWA also restored a mission church at the Tumacacori National Monument. Short & Stanley-Brown, *supra*, at 152. These projects and sites have served the important secular purpose of inculcating new generations with American history, not the purpose of inculcating religion.

* * *

As it ponders the permissibility of the Ten Commandments displays in this case and in *McCreary County*, the Court should consider the important American tradition of erecting monuments to our history, including the role of religion. This

tradition quite obviously does not seek to advance religion; it seeks instead to preserve and tell the stories of who we are as a people and the foundations of our social and political cultures. It serves an important secular purpose for government to convey this historical perspective to all citizens, regardless of belief. And the Ten Commandments are most certainly a part of our heritage: "[S]uch are the Hebraic roots of American order, whether or not the reader of this book wholly accepts the Law and the prophets." Russell Kirk, *The Roots of American Order* 38 (1974).

II. Establishment Clause Inquiry Into Government Purpose Is Unfair and Unworkable

A. The secular purpose test leads to unfair results, particularly when past improper purposes taint new displays having legitimate secular purposes

One reason that Texas' Ten Commandments monument survives scrutiny under the endorsement test is that the record contains no evidence demonstrating that Texas officials accepted the monument with religious objectives in mind. (Pet. App. 9-12) That history, combined with the well-established understanding that the Ten Commandments have had a dramatic impact on Western (in particular American) secular political culture, means that the Texas display survives scrutiny under the "secular purpose" inquiry of the endorsement test. (*See id.*) An identical Fraternal Order of Eagles monument on Colorado's State Capitol grounds also has a legitimate secular purpose. *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1023-24 (Colo. 1995).

Other local governments displaying identical Ten Commandments monuments donated by the Eagles have not been as fortunate with respect to their historical records. In *Books v. City of Elkhart*, 235 F.3d 292, 303-04 (7th Cir. 2000), for example, the court determined that Elkhart had accepted the

Eagles monument in 1958 with an improper religious purpose in mind because clergy had spoken at the dedication ceremony. The court also ruled that the Elkhart City Council's effort to purify its purpose by passing a resolution declaring that the monument should continue to be displayed on city grounds for secular historical reasons was a sham and could not overcome the improper objectives of public officials long passed from the scene. *Id.* at 304.

Thus, with respect to identical Ten Commandments monuments, two governments are permitted to display their monuments, while a third is prohibited from doing so, all because of what some public officials and clergy said forty or more years ago. The *McCreary County* case further complicates matters by not permitting public officials to overcome past improper objectives with statements of purely secular purposes concerning a *new* Ten Commandments display adorned with additional historical documents and symbols. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693).

Indiana's experience adds yet another dimension to the unfairness produced by the purpose test. From 1958 until 1991, when a vandal spray-painted and then toppled it, an Eagles Ten Commandments monument stood without challenge on the Indiana Statehouse lawn—a lawn that also features twelve other historical markers and monuments, as well as seven dedicated trees. Several years after this vandalism, several Indiana limestone companies donated a replacement monument that featured not only the Ten Commandments, but also the Bill of Rights and the Preamble to the Indiana Constitution. *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002).

In a March 14, 2000, press release explaining why he was accepting the replacement monument for the Statehouse lawn, the late Indiana Governor Frank O'Bannon remarked that the new monument was intended to "be an integral part of the Statehouse setting, which honors the history of our state and nation." *Id.*[1] However, the Governor also stated that the vandalized monument donated by the Eagles had "stood on the Statehouse lawn as a reminder of some of our nation's core values." *Id.* The district court and the Seventh Circuit inferred that the Governor's "core values" characterization of the *prior* monument related to *religious* core values (as opposed to the core values of liberty and law), and furthermore inferred that the Governor had "primarily" a religious purpose in mind, rather than his stated secular purpose, when he accepted the *new* monument. *Id.* at 772; *Ind. Civil Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842, 851-52 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766, 773 (7th Cir. 2001).

Thus, assuming the Court upholds, as it should, Texas' Eagles monument, but also affirms, as it should not, the Sixth Circuit's use of the secular purpose rule to hold the *McCreary County* display irremediably tainted, Indiana may be frustrated in erecting any new Ten Commandments display just because nearly five years ago a twice-succeeded Governor referred to a prior display—identical to Texas'—as a statement of "core values." Adding insult to injury is the fact that the Governor had occasion to accept the new monument only because one of the plaintiffs in that case vandalized the State's prior Ten Commandments display. As with the experience of McCreary County, even the possibility of such a

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[1] For the full text of Governor O'Bannon's press release, see Petition for Writ of Certiorari filed Dec. 28, 2001, in *O'Bannon v. Indiana Civil Liberties Union,* No. 01-966, 71a-74a, *cert. denied,* 534 U.S. 1162 (2002).

result demonstrates the unfair and absurd outcomes that can follow from the purpose test.

Nor is this problem limited to cases involving Ten Commandments monuments. For example, in *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 349 (Or. 1976), the court permitted a city park to display a large cross because, notwithstanding any earlier improper purposes, a new secular purpose had emerged to justify its display. But in *Gonzalez v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1414-15, 1421 (7th Cir. 1993), the court rejected a city park's claim that it was displaying, as a war memorial, a crucifix donated by the Knights of Columbus because a Knights spokesperson (not a public official) had referred to the cross in religious terms twenty-eight years earlier. Because of the purpose test, once again, one government may display a religious symbol for secular reasons, while another may not.

B. The purpose test has shifted over time

One failure of the purpose test has been its inconsistent application. In many cases the Court has been highly deferential to government defendants' stated secular purposes, while in others it has been far more skeptical of those assertions. The result is confusion about exactly what scrutiny lower courts should undertake when applying the purpose test. *Compare O'Bannon*, 259 F.3d at 771-72 (rejecting the Governor's asserted secular purpose because the court doubted whether it was the primary purpose), *with Kreisner v. San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (deferring to the city because it claimed at least one secular purpose). Unless the Court scraps or modifies the purpose test here or in *McCreary County*, this inconsistency, and the uncertainty for state and local governments that it creates, will likely persist.

1. To begin, in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), the Court accepted the government's asserted secular purposes because such claims must "be accorded appropriate deference." In *Lynch v. Donnelly*, the Court observed that it "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was *motivated wholly* by religious considerations." 465 U.S. 668, 680 (1984) (citations omitted) (emphasis added). After observing that the "narrow question is whether there is *a* secular purpose for Pawtucket's display of the crèche," the Court took Pawtucket at its word that it sponsored the display to "celebrate the Holiday and to depict the origins of that Holiday." *Id.* at 681 (emphasis added). Notably, the Court held "only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires" and specifically disclaimed Pawtucket's need of an *exclusively* secular purpose. *Id.* at 681 n.6.

The Court has reaffirmed this deferential approach. In *Bowen v. Kendrick*, 487 U.S. 589, 603-04 (1988), the Court sided with the government because, even if the Adolescent Family Life Act "was motivated in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate secular concerns." Similarly, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 249 (1990), a plurality of the Court agreed that the Equal Access Act's religious activity protections were justified by the secular purpose of preventing speech discrimination notwithstanding that some legislators may have wanted to protect religious speech in particular: "[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *See also Wallace v. Jaffree*, 472 U.S. 38, 56

(1985) (observing that even "a statute that is motivated in part by a religious purpose" may be valid).[2]

This line of cases yields a relatively light standard whereby "the Court is "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned . . . ." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Yet this has not been the operative consideration in all cases.

2. The Court has at times undertaken a more searching analysis and attempted to look behind the plausible or stated purposes of government action to discern the government's supposed *actual* purposes. The Court has also employed a comparative test whereby it attempts to discern the *primary* purpose for governmental action supported by both religious and secular purposes.

In *Stone v. Graham*, 449 U.S. 39, 41 (1980), for example, the Court rejected the asserted secular purpose behind posting the Ten Commandments on public school classroom walls, saying that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." The Court arrived at this conclusion notwithstanding its acknowledgement that the Ten Commandments may be part of a public school curriculum for multiple secular reasons. It simply chose not to defer to the government's asserted secular purpose.

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[2] *Widmar v. Vincent*, 454 U.S. 263 (1981), is instructive as well. The Court held that providing religious groups with access to a state university's open forum would be permissible because doing so "would have a secular purpose." *Id.* at 271 & n.10. This implies that any improper purposes that administrators might also have would be irrelevant.

Similarly, in *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987), the Court accepted the notion that states could require public schools to teach creation science under the pure secular purpose of promoting skeptical inquiry. Nonetheless, the Court second-guessed Louisiana's stated secular purpose for its creation-science law because, based on a few comments by the legislative sponsor, it deemed the Act's "primary purpose" to be endorsement of religious laws. *Id.* at 592-94. Thus, notwithstanding the availability of a plausible secular purpose, the Court chose to look behind the statute to discern the "primary" purpose. The Court even listed in detail possible sources of information for discerning the primary purpose behind assertedly secular legislation in future cases. *Id.* at 593-94. This approach evinces a skeptical attitude that is far different from the deferential approach of *Lemon*, *Lynch*, *Bowen*, *Mergens* and *Mueller*.

Finally, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court rejected a public school's stated secular purpose for permitting a student message or invocation at football games. The school policy declared that the purpose was to solemnize the event, and the Court acknowledged that this purpose was "entitled to some deference." *Id.* at 306, 308. Nonetheless, the Court ultimately concluded that, because prayer is the most obvious way to solemnize an event, because the policy specifically permitted an "invocation," and because the school had a prior policy of permitting student-led prayer at football games, the "specific" purpose of the policy must have been to preserve a religious practice. *Id.* at 309. Particularly significant in *Santa Fe* was the Court's assertion that these factors made it "reasonable" to infer that a religious purpose underlay the policy. *Id.*

Thus, while *Mueller* ruled that the Court should be reluctant to second-guess a plausible secular purpose, *Santa Fe* ruled that the Court could do so as long as it was merely

"reasonable" to infer that a religious purpose may have existed. As professor Steven Smith has written, "[i]t is far from clear how a court can be expected to distinguish sham purposes from sincere ones when it is also required to 'defer to . . . stated intent.'" Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 286 (1987) (quoting *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring)).

3. Even the "taint" doctrine, which leads to the unfair results recounted in Part II.A, *supra*, is part of the secular purpose rule's problematic metamorphosis.

As mentioned, the Court in *Santa Fe* ascribed religious purposes to an assertedly secular school policy in part because the policy at one time had provided for student-initiated prayer. *Santa Fe*, 530 U.S. at 309. But obsessive focus on long-ago stated purposes and the history surrounding prior displays deviates substantially from the Court's earlier understanding of the purpose test. In particular, in *McGowan v. Maryland*, 366 U.S. 420, 444-47 (1961), the Court upheld Maryland's Sunday closing laws because, regardless of the religious origins of such laws, a secular justification had emerged over time. *Id. See also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2325 (2004) (O'Connor, J., concurring) (stating that even if some legislators voted to add "under God" to the Pledge of Allegiance out of religious motivations, "[a]ny religious freight the words may have been meant to carry originally has long since been lost.").

If the Court chooses to preserve the purpose test, it should make clear that the *McGowan* approach applies and that prior improper religious purposes do not taint present secular purposes justifying the same activity, particularly where new government officials are now in place. Limiting the secular purpose test to the question of whether the government action

could be justified by any reasonable secular purpose would accomplish that objective. *See Lynch*, 465 U.S. at 681 n.6. So would clarifying that government officials may reconstitute their purposes over time. Only through these modifications can the Court preserve the purpose test and also provide for equal justice across jurisdictions.

C. The purpose test's uneven application stems from its inherent unsuitability as a means of detecting "establishments" of religion

The Court's varying applications of the purpose test reflect the extraordinary difficulty of applying the test and, more to the point, the test's vulnerability to manipulation (even if unintentional) and its inherent inability to provide equal justice over time. These are systemic problems that follow from the lack of a well-understood connection with the values underlying the Establishment Clause.

1. The most obvious difficulty in applying the secular purpose test (as understood in, *e.g.*, *Stone*, *Edwards*, and *Santa Fe*) is to divine the supposed actual or prevailing purpose of a government official or body. Judges applying the purpose test probe deep into a government body's political culture, legislative history, interpretations and statements regarding the law, historical context, and even the fit between the act and its secular ends. The objective is to unravel an infinite variety of complementary, intertwined purposes and determine not just what they are, but which among them is "primary."

That judges undertake to determine whether the articulated secular purposes of public officials (who are equally under oath to uphold the Constitution) are nothing but a "sham" implies institutional distrust and deeply offends comity. *Edwards*, 482 U.S. at 586-87; *see also id.* at 610 (Scalia, J., dissenting) ("[T]he Court today holds . . . that the members of

the Louisiana Legislature knowingly violated their oaths and then lied about it."). That courts often must grope for the actual purposes of entire legislative bodies and not just individual government officials turns the implausible into the futile. *Id.* at 637 (Scalia, J. dissenting) ("To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."). It is inherently unjust for constitutionality to turn on a single legislator's (or government executive's) ill-conceived comment in support of a law or a display, as if the resulting law were the "fruit of a forbidden tree." *Id.* at 638.

A plurality of the Court may have backed away from such an incredulous approach in *Mergens*, where the Court upheld the Equal Access Act notwithstanding the religious motivations of some who voted for it. *Mergens*, 496 U.S. at 249. But even the *Mergens* plurality ultimately reasoned that having a religious *motivation* is distinguishable from having a *purpose* of advancing religion. *Id.*; *but see*, *e.g.*, *Lynch*, 465 U.S. at 680 (articulating the purpose test in terms of motivations). The supposed distinction is that, while the Establishment Clause prohibits government from advancing religion, it does not enjoin government officials from pursuing secular policies from religious motives. *See Edwards*, 482 U.S. at 614-15 (Scalia, J., dissenting) (contrasting cases that speak of activities "endorsing," "advancing," or "establishing" religion from secular policies pursued for religious motives, such as providing for the homeless).

Requiring courts to find a blurry line between the two is yet another impediment to principled, consistent adjudication. Indeed, if courts fail to draw the motive/purpose distinction accurately, the purpose test may ultimately result in judicial decisions that effectively exclude the religious from political participation. *See id.* Regardless, the purpose test is laden with entirely subjective inquiries, making it highly susceptible to unequal applications.

2. The impossibility of applying the secular purpose test with objectivity and consistency rests in part on its questionable jurisprudential rationale. "It is . . . far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion; and if not inevitable, any reading with such untoward consequences must be wrong." *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting). The endorsement test as a whole has been derived from the notion that the Establishment Clause exists in part to prevent religious minorities from feeling like "outsiders." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The implicit theory for including a secular purpose component appears to be that, regardless of the effect of government action, the mere existence of a religious purpose alone can somehow exclude or create outsiders.

Even aside from the conceptual riddle of how a religious purpose can exclude when the effect does not, the Establishment Clause roots of the "outsider" premise are far from clear. For example, Steven Smith writes that the Establishment Clause had once been "primarily concerned with maintaining proper institutional relations." Smith, *Symbols*, *supra* at 299. He describes the "outsider" premise as reconceiving the Establishment Clause as a source of individual rights rather than as a regulator of institutional relations. *Id.* Professor Michael Paulsen has argued that, even if intended to advance religion, if government action has no religiously coercive impact, "the Establishment Clause supplies no justification for outlawing it," and therefore "[t]he purpose prong of *Lemon* thus serve[s] no legitimate function . . . ." Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 803 (1993). In light of the secular purpose test's rather shaky jurisprudential foundation, it is no wonder that enforcement

varies so wildly: Courts are likely unsure what the doctrine is ultimately trying to achieve.[3]

D. Historical displays with religious connotations should be judged only as to whether they represent actual religious coercion

Particularly because the purpose test suffers from deep and insoluble practical problems leading to unjustified disparate treatment of similar government displays, the Court should, with respect to display cases at least, move toward a standard with firmer constitutional footing and clearer criteria. Doing so would not only result in greater equality across jurisdictions, but it would also provide government officials with more predictable outcomes.

In *McCreary County*, the *amici curiae* brief of Alabama and other states proposes that, with respect to Establishment Clause challenges to government displays, the Court should

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[3] Nor can the secular purpose test be justified by reference to the use of an at-least-nominally similar test in Equal Protection cases. *See, e.g.*, Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 118 (2002) (supporting purpose test, but stating that "[t]he basic premises of democracy condemn a political process in which the decisionmakers are racist, but not a political process in which some of the decisionmakers have religious views and allow those views to influence their political positions"); Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. Ill. L. Rev. 915, 942 (1990) ("[N]either the participation of religious persons nor the use of religious rhetoric creates a constitutional flaw in the political process. Simply put, pure motivation analysis is not justified by political process theory and should be abandoned in establishment clause jurisprudence.").

discard the endorsement test entirely and consider employing instead the coercion test proposed by Justice Kennedy in his *Allegheny* opinion. *Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part) (describing parameters of coercion test). Here the *amici* states provide an additional rationale for applying the coercion test to government displays.

The Court has understood the Establishment Clause to permit government traditions having religious significance because of its appreciation for the secular dimensions and common acceptance that also characterize those traditions. *Marsh v. Chambers*, 463 U.S. 783, 792 (1982), in particular, ruled that legislatures may hire a chaplain to conduct legislative prayer because Congress and state legislatures have engaged in that practice throughout our history.

Similarly, the "common sense of the matter" permits the Court to open its sessions with "God save the United States and this Honorable Court" and for the currency to bear the motto "In God We Trust." *Zorach v. Clausen*, 343 U.S. 306, 312-13 (1952); *see also Marsh*, 463 U.S. at 792; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (stating that the "history and ubiquity" of practices with religious significance enables them to convey a message related to common secular culture rather than religion). Moreover, *Marsh* ruled that a government's "tolerable acknowledgement of beliefs widely held among the people of this country" will not offend the Establishment Clause. *Marsh*, 463 U.S. at 792.

As set forth in Part I, *supra*, and in the *amici curiae* brief of Alabama and other states in *McCreary County*, state and local governments all over the country have a long and rich tradition of displaying tributes to our religious roots and heritage, including the Ten Commandments. For these reasons, the coercion test can safely be used in government display cases as a safeguard against presentations that go too

far. As long as the display, new or old, does not "coerce anyone to support or participate in any religion or its exercise," it should be permitted under the Establishment Clause. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

As for analyzing the display at issue here, Texas' monument easily passes both the endorsement test and the coercion test. It satisfies the purpose test because there is no evidence that Texas officials had the purpose of advancing religion when they accepted or dedicated it, and it satisfies the effects test as a mere "passive acknowledgement" of the role of the Ten Commandments in society and as a type of government activity "accepted in our national heritage." *See id.* at 663 (Kennedy, J., concurring in the judgment in part and dissenting in part). Nor, for largely the same reasons, does the monument in any way coerce participation in religion or its exercise—it does not even have a captive audience as in *Stone*. Texas' monument survives any plausible test the Court may apply to it.

* * *

Our Founders created secular government and disestablished religion, but their own religious learning in general, and the Ten Commandments in particular, profoundly influenced those Founders and ultimately the endurance of the Republic. Texas' Ten Commandments display—set among numerous markers honoring the history of Texas and the Nation—merely commemorates the profound historical influence of the Commandments. Like nearly all government tributes to religious heritage, it is fully consonant with the First Amendment: It coerces nobody, creates no impression of religious endorsement, and belongs to a government tradition with rich secular significance. To enjoin government recognition of the role of the Ten Commandments in our culture is to enjoin an accurate portrayal of the very wellsprings of our history.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE JANET NAPOLITANO, GOVERNOR OF THE STATE OF ARIZONA, THE HONORABLE JAN BREWER, SECRETARY OF STATE OF THE STATE OF ARIZONA, THE HONORABLE JAMES WEIERS, SPEAKER OF THE HOUSE OF REPRESENTATIVES, THE HONORABLE KEN BENNETT, PRESIDENT OF THE SENATE, AND 36 OTHER MEMBERS OF THE FORTY-SEVENTH LEGISLATURE OF THE STATE OF ARIZONA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This brief of *Amici Curiae* is submitted on behalf of the Honorable Janet Napolitano, Governor of the State of Arizona, the Honorable Jan Brewer, Secretary of State of the State of Arizona, and 38 members of the Arizona Legislature, including the Speaker of the House and President of the Senate. *Amici* recognize the importance of this case and urge this Court to affirm the ruling of the United States Court of Appeals for the Fifth Circuit.[2]

The State of Arizona displays a Ten Commandments Monument on the grounds of its State Capitol Complex that is almost identical to the one before the Court in this case. Arizona's monument was the subject of a threatened lawsuit in July of 2003. *See* Michael Clancy, *ACLU Seeks Religion-Free Bolin Plaza*, Arizona Republic, July 18, 2003, at A1.

Amici write as elected officials and as citizens to highlight their concern with the impact this case will have on Arizona's Ten Commandments monument and on Arizona's continued ability to acknowledge the social and cultural contributions of religious faith.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. None of the counsel for the parties authored this brief in whole or in part. Counsel for *amici* have applied for a grant from the Alliance Defense Fund ("ADF") for the preparation of this brief. ADF is a non-profit, 501(c)(3) organization that funds legal work in the public interest. Counsel for *amici* certify that they are the exclusive authors of this brief and that ADF in no way controls the content of this brief.

[2] Arizona's Attorney General, the Honorable Terry Goddard, has already joined with the Attorneys General of 17 other states in a different brief of *amici curiae* in support of Texas. *See* Brief of *Amici Curiae* of the States of Indiana, *et al.*, *Van Orden v. Texas* (No. 03-1500).

SUMMARY OF THE ARGUMENT

This case is an historic opportunity for this Court to reaffirm the ability of states to accommodate and acknowledge religion with public displays. The Texas Ten Commandments monument is a classic example of such permissible government acknowledgment of religion.

For its part, Arizona has an unbroken history of acknowledging that religion is important both to its form of government and to its citizens. Arizona's succinct Preamble to its Constitution declares that the people of Arizona are "grateful to Almighty God for [their] liberties." Ariz. Const. Preamble. Arizona's State Seal and State Anthem acknowledge God's blessing and presence. The decorations, art, statues, and memorials at the State Capitol Complex are filled with references to religion. Acknowledging religion's important place in culture and society is a practice Arizona continues to the present. The recently erected memorials to Father Albert Braun and slain Arizonan Balbir Singh Sodhi are examples of this continuing practice.

The Fifth Circuit was right to uphold the constitutionality of the Texas Ten Commandments monument because Texas has a valid secular purpose for the monument and because the monument is not an impermissible state endorsement of religion. The purpose inquiry has, at times, devolved into a scrupulous investigation for any semblance of religious purpose by the government. In order to avoid inconsistent and unfair results, this Court should reaffirm its purpose prong standards from *Lemon v. Kurtzman* and *Lynch v. Donnelly*: courts should generally defer to official statements of secular purpose and the government need only present a single secular purpose to pass constitutional muster.

State endorsement is gauged with the objective standard of the reasonable observer. Endorsement analysis is rendered an absurdity if the observer is deemed to possess selective knowledge or attributed a myopic focus on religious monuments to the exclusion of other monuments of cultural significance. Moreover, no reasonable observer looking at a state capitol grounds filled with monuments would perceive unique state endorsement of a single religious display simply because it is located at the seat of government.

In religious display cases, the age of the display in question is often part of the endorsement analysis. Indeed, the age of the Texas Ten Commandments monument negates the possibility that the reasonable observer would perceive it as an endorsement of a particular religion. But the First Amendment was not meant to be a "grandfather clause" for aged monuments. Newer monuments, like Arizona's monument to Father Albert Braun, erected on the grounds of the Capitol Complex in 2001, do not impermissibly carry the government's endorsement when they are one of many displays commemorating a diverse culture.

Finally, Petitioner's challenge to the Texas monument smacks of a heckler's veto and utterly lacks constitutional injury. This Court should decline to read into the Establishment Clause a right to suppress particular manifestations of our culture based on mere personal disagreement. The First Amendment does not confer a right to selectively censor religious monuments.

ARGUMENT

I. THROUGHOUT ITS HISTORY, ARIZONA HAS CONSISTENTLY RECOGNIZED THE IMPORTANCE OF RELIGIOUS FAITH TO ITS CITIZENS

Like Texas, the people of Arizona, by the decision of their elected officials, display a Ten Commandments monument on the grounds of their State Capitol. Arizona's Ten Commandments monument is one of the many ways the State acknowledges the role of religious faith in the lives of its citizens.

A. Arizona Acknowledges Religious Faith In Its Founding Documents And In Its Symbolism

Religion has always been a central part of Arizona's government. Arizona is an example of the truth of the maxim voiced by Justice Douglas, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Arizona's founders chose to begin its Constitution with the words, "We, the people of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution." Ariz. Const. Preamble. The delegates to the Arizona Constitutional Convention in 1910 appointed a chaplain, the Reverend Seaborn Crutchfield, to open each meeting of the Convention in prayer. On the second day of the Convention Rev. Crutchfield offered this prayer:

> Oh, Lord! We come before thee, the members of this convention, in the attitude of prayer, and we ask Thy blessings upon each and every member of this convention. . . . We pray thee, Oh Lord, that this body of men, the representatives of the people of Arizona, may frame such a constitution as will meet the approval of every citizen and that it may grant unto Arizona statehood, and place it among the grand galaxy of states in these United States. . . . These blessings we would ask of Thee, in the name of Jesus Christ, Thy Son, Amen.

The Records Of The Arizona Constitutional Convention Of 1910, 9 (John S. Goff ed., 1991) [hereinafter *Records*].

Arizona expressly acknowledges God in its official state symbolism. The Great Seal of the State of Arizona bears the phrase "*Ditat Deus*" or "God enriches." *Records*, *supra* at 651. Arizona's State Anthem also acknowledges God:

> Come stand beside the rivers
> Within our valley broad.
> Stand here with heads uncovered,
> In the presence of our God!
> While all around about us,
> The brave, unconquered band,
> As guardians and landmarks,
> The giant mountains stand.

1919 Ariz. Sess. Laws Ch. 28 § 1. "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring).

B. Arizona Acknowledges Religious Faith With Many Monuments And Displays At The State Capitol Complex, Including Its Ten Commandments Monument

Religion is an essential part of Arizona's story. Catholic missionaries to the Native Americans formed a crucial part of what would become Arizona's cultural identity. The Arizona Capitol Complex includes a statue of one of the most famous of these men, Father Eusebio Francisco Kino. *See* Ariz. State Library, Archives and Pub. Records, Museum Div., *Wesley Bolin Memorial Plaza: Memorial Descriptions* 1 (2001) (on file with the Arizona State Library) [hereinafter *Memorial Descriptions*]. The role of the early missionaries, like Father Kino, is also memorialized inside Arizona's Capitol building. In the 1930s the artist, Jay Datus, was commissioned to paint a series of murals to commemorate Arizona's history. One of the murals entitled, "Missionary Era in Arizona," depicting several missionaries ministering to Native Americans, hangs in the Arizona State Library Reference Room. Ariz. State Library, Archives and Pub. Records, *Dressing Up the Capitol*, *at* http://azcapitol.lib.az.us/capitol_dressing.htm (last visited

01/24/05). The artist explained the painting represented "all the brave men who suffered for their ideals and faith." *Id.*

Arizona's State Capitol Complex contains a monument to Armenian Martyrs, memorializing the victims of a religious pogrom in Turkey between 1915 and 1923. The monument quotes the famous cleric of the Armenian Church, Gregory of Narek: "Let lamentation cease, weeping be stifled; to mourning make an end; let darkness turn to light." The back of the monument contains the engraved names of survivors of the violence who immigrated to Arizona. *Memorial Descriptions*, *supra* at 1. Another monument on the grounds of the Arizona Capitol Complex commemorates "the Arizonans of Jewish Faith who gave their lives in the service of their country." *Id.* In 1984, another monument was added honoring the memory of the Reverend Martin Luther King Jr., whose Christian faith led him to tirelessly champion a national struggle for civil rights. *Id.*

Arizona received its Ten Commandments monument as a gift from the Fraternal Order of the Eagles. The monument is nearly identical to the one at issue in this case. An inscription at the bottom of the monument reads: "Presented To The State Of Arizona By Fraternal Order Of The Eagles Of Arizona 1964." *See* App. 1 (photograph of the monument). Like the challenged monument in this case, Arizona's monument is displayed in a location close to the Capitol building and between the Capitol and the State Supreme Court.

C. Arizona Continues To Commemorate The Religious Faith Of Its Citizens To This Day

Arizona continues the practice of erecting public displays of religious significance. Two recently placed monuments are good examples. In 2001, Arizona placed a statue memorializing Father Albert Braun, a Franciscan priest who, after serving as an Army chaplain in both World Wars, ministered in Arizona from 1949 until his death in 1983. *See*

Program for the Father Braun Memorial Dedication 3-5 (March 4, 2001), *at* http://braunsacredheartcenter.org/br5.jpg *and* http://braunsacredheartcenter.org/br6.jpg *and* http://braunsacredheartcenter.org/br7.jpg (last visited 01/24/05). Father Braun's memorial was dedicated in a ceremony filled with religious significance, including an invocation, benediction, blessings of his statue, and a hymn. *Id.* at 11, *at* http://braunsacredheartcenter.org/br13.jpg (last visited 01/24/05).

Arizona's recent recognition of religious faith extends beyond the Capitol grounds. On September 15, 2001, Arizona and the nation were shocked when Balbir Singh Sodhi, an Arizonan and a devout Sikh, was murdered because he wore a turban. *See* Laurie Goodstein and Tamar Lewin, *A Nation Challenged: Violence And Harassment: Victims Of Mistaken Identity, Sikhs Pay A Price For Turbans*, New York Times, September 19, 2001, at A1. The City of Mesa remembered Mr. Sodhi by planting a tree and putting up a plaque, which reads in part: "Sikhs believe: In one God. That all religious paths lead to God. That all people are equal in the eyes of God. In peace, and love for humankind." The city dedicated the plaque at an event entitled the "Embrace Diversity Memorial Event." *See* Lois Romano, *In 9/11 Events, Mixture of Pain And Patriotism; Disparate U.S. Ceremonies Have a Common Thread*, Washington Post, August 26, 2002, at A01; *and* Hari Nam Singh, *Balbir Singh Sodhi Memorial Dedication September 14, 2003 in Mesa, Arizona, USA, at* http://healingsource.com/sodhi/sept-14-2003/gallery/pages/med/100_med.html (last visited 01/24/05).

The memorials for Father Braun and Mr. Sodhi demonstrate that governments erect religious displays because they recognize that religious faith is important to individuals and to society at large.

II. THIS COURT SHOULD AFFIRM THE FIFTH CIRCUIT AND ESCHEW RIGID STANDARDS THAT MILITATE AGAINST THE ROLE OF RELIGION IN A PLURALISTIC SOCIETY

Arizona's consistent practice of acknowledging religious faith is far from anomalous. The federal government, to which the Establishment Clause is addressed, has acknowledged and affirmed the role of religion from its very creation. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

America's religious heritage and its modern religious pluralism are compelling reasons for this Court to be wary of "rigid, absolutist view[s] of the Establishment Clause." *Id.* at 678; *see also County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 623 (stating the Court avoids analytical lines, "which entirely sweep away all government recognition of the role of religion in the lives of our citizens. . . .").

The Fifth Circuit found that Texas possesses a valid secular purpose for displaying its Ten Commandments monument. *Van Orden v. Perry*, 351 F.3d 173, 178-80 (5th Cir. 2003). This finding is correct because the purpose prong of the *Lemon* test requires that "appropriate deference" be accorded to the government's stated purpose for a religious display. *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). But in the years since *Lemon* was decided, this Court has applied the purpose prong both deferentially and with unrelenting scrutiny. *Compare, Mueller v. Allen*, 463 U.S. 388, 394-95 (1983); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Bowen v. Kendrick*, 487 U.S. 589, 603-04 (1988); *and Bd. of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 249 (1990); *with Stone v. Graham*, 449 U.S. 39, 41 (1980); *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *and Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). These divergent approaches have led to fundamentally inconsistent results in lower courts. *See, e.g., Kreisner v. San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (deferring to city's stated secular purpose); *and Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (finding that state's asserted purpose was not in fact its "primary purpose").[3] This Court should clarify the applicable standards so that government and citizens alike can discern the requirements of the First Amendment.[4]

The purpose prong was never intended to root out religious references from the public square. "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Lynch*, 465 U.S. at 681 n.6. If this Court retains the secular purpose test,[5] it should clarify that the government need only provide a single secular purpose to justify official acknowledgment of religion.

The Fifth Circuit was also correct in holding that the Texas Ten Commandments monument did not have the effect of impermissibly advancing religion. *Van Orden*, 352 F.3d at 180-82. The court appropriately applied the standard of the reasonable observer. *Id.* (citing *Allegheny*, 492 U.S. at 595).

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[3] As Chief Justice Rehnquist has observed, the purpose prong is "mercurial in application." *Wallace*, 472 U.S. at 108 (Rehnquist, C.J., dissenting).

[4] As this Court has recognized, unclear standards "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quoting *Bagett v. Bullitt*, 377 U.S. 360, 372 (1964)).

[5] *Amici* join the suggestion of the 18 *amici* States, including Arizona, that the purpose test should be abandoned in favor of a clearer and more objective approach. *See* Brief *Amici Curiae* of the States of Indiana, *et al.* at 2-3; 18-19, *Van Orden v. Texas* (No. 03-1500).

The reasonable observer test is an objective inquiry; "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying a challenged program." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001); and *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995)).

Justice O'Connor has recently explained why the test is objective:

> Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement. . . . There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.

Elk Grove Unified School Dist. v. Newdow, 124 S.Ct. 2301, 2321-22 (2004) (O'Connor, J. concurring) (emphasis in original; internal citation omitted). In this case, the Petitioner urges this Court to believe that a reasonable observer would myopically focus on the Ten Commandments monument while failing to notice any of the other historical and cultural monuments on the Texas Capitol grounds. This approach truly does "render the test an absurdity." If followed, it would mechanically invalidate all state references to religion.

This Court should also decline all invitations to place exclusive reliance on whether a religious display is situated in or near the "seat of government." *See, e.g.*, Brief of Petitioner at 34-38, *Van Orden v. Perry* (No. 03-1500). Texas displays many memorials, statues, works of art, and general commemorations on its capitol grounds. Some of these displays have religious content, others do not, but they all share the common purpose of commemorating the state's cultural heritage. The reasonable observer must be deemed aware of these facts.

If religious displays could be considered unconstitutional simply because of placement at "the seat of government," countless existing displays in Texas, in Arizona, and across the nation would be affected. Displays in the Supreme Court building and in this Court's own chamber could hardly survive such scrutiny. *See Lynch*, 465 U.S. at 677. Overemphasis on whether a display is near the "seat of government" eviscerates the reasonable observer standard. Texas is a diverse state with heterogeneous religious practices. The reasonable observer knows of this diversity and would never expect any one decoration on the capitol grounds to carry the state's imprimatur to the exclusion of all others.

The "history and ubiquity" of religious displays has become a key part of the endorsement inquiry. *See Newdow*, 124 S.Ct. at 2323-24 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring); *see also Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 265 (3d Cir. 2003) ("the reasonable observer would perceive a historic plaque as less of an endorsement of religion than a more recent religious display"). The Texas Ten Commandments Monument has been publicly displayed for 42 years without a legal challenge. *See Van Orden*, 351 F.3d at 181. This is a cogent reason why the reasonable observer would never consider its presence a state endorsement of a specific religious belief. But even if the Texas monument was much younger, it would still be constitutional. The Establishment Clause is more than just a "safe harbor" for antiquated relics of what American society once was. States should be allowed to continue to celebrate their present culture, even as they commemorate their proud heritages.

The age of a religious display, though sometimes relevant, should not be dispositive of its constitutionality. Arizona's memorials honoring the memories of Father Braun and Balbir Singh Sodhi are not impermissible endorsements of religion simply because they were erected in 2001 and 2003, rather than in 1964 like Arizona's Ten Commandments monument. This Court should avoid an analytical approach that would create a constitutional "grandfather clause" for older monuments, but rigidly invalidate all modern commemorations of religious faith.

III. PERSONAL DISAGREEMENT IS NOT CONSTITUTIONAL INJURY

The Petitioner in this case could make no claim of constitutional injury if he were seeking to suppress a display that he disagreed with as a matter of politics, philosophy, or artistic taste.[6] The result should not change here, where he has targeted one of many monuments on the Texas State Capitol grounds because he disagrees with its religious content. *Van Orden*, 351 F.3d at 175-76.

> [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

Newdow, 124 S. Ct. at 2327 (O'Connor, J., concurring).

Significantly, Petitioner and others who oppose government recognition of religious faith are not without recourse. This Court has repeatedly affirmed that the government is politically accountable for the content of its own

[6] *See generally, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982) ("psychological" injury is insufficient to confer Article III standing).

speech. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *Rust v. Sullivan*, 500 U.S. 173, 192-95 (1991). The Establishment Clause, however, as illuminated by history, does not convey a heckler's veto to offended observers. To rule otherwise would trigger the expurgation of monuments and displays across the country.

CONCLUSION

The Establishment Clause is not at odds with our nation's religious heritage or with the necessary role religion plays today in our pluralistic culture. The Texas Ten Commandments monument should not be removed from amid all the other cultural monuments on the Capitol grounds because of its religious content.

The statue of Father Kino at the Arizona State Capitol Complex in Phoenix includes an embedded time capsule, which will be opened on August 22, 2235. *Memorial Descriptions*, *supra*, at 1. *Amici* trust that on that day displays like the statue of Father Kino and the Ten Commandments monument will still be standing, having survived all misguided attempts to remove them from the public square.

The Court should affirm the decision below.

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Dated: January 27, 2005

APPENDIX

Ten Commandments Monument
Arizona State Capitol Complex
Phoenix, Arizona

No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

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[1] The parties have consented to the filing of this brief and copies of the letters of consent are filed with the Clerk. No person, organization or corporation other than the *amicus* and the organizations named herein have assisted in or contributed to the preparation of this brief.

INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. Over the past 37 years, COLPA has filed *amicus curiae* briefs in this Court in 30 cases involving the Religion Clause of the First Amendment.[2]

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[2] *Newdow v. Elk Grove Unified School District*, 124 S.Ct. 2301 (2004); *Locke v. Davey*, 540 U.S. 712 (2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Dewey v. Reynolds Metals Co.*, 402 U.S 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

COLPA submits this *amicus* brief on behalf of, and is joined by, the following seven national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America is the nation's largest grassroots Orthodox Jewish organization, with chapters in 36 states and more than 50 cities throughout the United States.

- National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply concerned with issues related to religious freedom.

- Torah Umesorah-The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that American society is best served when religion is allowed to flourish, and that attempts to maintain an impregnable "wall of separation" between church and state – including efforts to remove any mention of God from governmental discourse – may constitute government hostility to religion and may inhibit conscientious expressions and observances of faith.

INTRODUCTION

By Jewish tradition, *Aseret Ha-Devarim* – the "Ten Declarations," known popularly today as the "Ten Commandments" (the Hebrew word "*Devarim*" used in the Torah means "Declarations" or "Utterances" and does not mean "Commandments") – were engraved on two stone tablets by God's own hand and were carried down by Moses

from atop Mount Sinai. The first two of the Commandments were, according to accepted rabbinic exegesis of the Torah, spoken by God Himself to the Children of Israel assembled at the foot of the mountain. As representatives of the faith to whom the Ten Commandments were given and who transmitted them to the rest of civilization, we certainly do not minimize their profound religious significance.

At the same time, the Ten Commandments express principles of humanity and morality that have universal application. Indeed, over the course of time – more than 3300 years since the revelation at Mount Sinai – the Ten Commandments have come to be recognized as the foundation for legal and social structures in many secular governments and societies across the globe, including our own. A governmental display of the text of the Ten Commandments or of an easily understood symbol of these historic declarations does not, therefore, violate any federal constitutional guarantee. It conveys to the reasonable observer a message that is not only religious but is also historical, moral and secular.

ARGUMENT

I.

A RELIGIOUS SYMBOL MAY ALSO HAVE SECULAR SIGNIFICANCE

Many religious symbols have acquired, over the course of time, secular meaning in addition to their original religious message. The religious significance of such multi-faceted symbols to conscientious believers is not diminished when societies, groups or individuals – including those who do not subscribe to religious dogma – assign to these

religious symbols secular values that are meaningful to non-believers.

A Jewish religious symbol that has been found by several Justices of this Court to fit in this category is the menorah. In *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 613-614 (1989), Justice Blackmun noted in his plurality opinion:

> The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Earlier in his *Allegheny County* plurality opinion, Justice Blackmun accorded this dual significance to the Jewish religious holiday of Chanukah (492 U.S. at 585):

> Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and "as a cultural or national event, rather than as a specifically religious event."

The Court's decision in the *Allegheny County* case permitted a governmental display of the menorah – a symbol that originated in religious observance and has religious significance to observant Jews to this day. The menorah's additional dimension – the message that it and the Chanukah holiday convey to those who do not observe the rituals of the Jewish faith – was emphasized by Justice Blackmun in his

opinion. The Ten Commandments are similarly rooted in religious faith but have taken on additional non-religious facets that make its display constitutionally permissible.

II.

IN ADDITION TO THEIR RELIGIOUS DIMENSION THE TEN COMMANDMENTS SYMBOLIZE THE HISTORIC ORIGINS OF SOCIETIES GOVERNED BY LAW

The court of appeals' opinion in this case observed in terms that are so indisputable that they are subject to judicial notice (351 F.3d at 181):

> Even those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country. That extraordinary influence has been repeatedly acknowledged by the Supreme Court and detailed by scholars. Equally so is its influence upon ethics and the ideal of a just society.

In his dissenting opinion in *Stone v. Graham*, 449 U.S. 39, 45 (1981), then-Associate Justice Rehnquist said that it was "undeniable" that "the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." Dissenting (with Justices Scalia and Thomas) from the denial of certiorari, Chief Justice Rehnquist again noted that "the Commandments have secular significance as well, because they have made a

substantial contribution to our secular legal codes." He quoted the opinion of the Seventh Circuit that had acknowledged – even while finding a Ten Commandments display to be unconstitutional – that "the text of the Ten Commandments no doubt has played a role in the secular development of our society . . . ." *Books v. Elkhart,* 235 F.3d 292, 302 (7th Cir. 2000), *cert. denied,* 532 U.S. 1058 (2001).

In a Colorado case concerning a Ten Commandments monument on the grounds of the State Capitol in Denver, "[a]ll the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution." *State v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1024 (Colo. 1995), *cert. denied,* 516 U.S. 1111 (1996).

Indeed, the ubiquitous acceptance of the Ten Commandments by all members of society, including even non-believers, led to a seemingly anomalous rabbinic regulation regarding the daily prayer service. Although the Ten Commandments had been recited daily in the Temple (Mishna *Tamid* 5:1), the rabbis directed that their recitation be omitted from the prescribed service after the Temple was destroyed because the "heretics" would infer erroneously that only the Ten Commandments had been divinely given (Talmud *Berachot* 12a). This account attests to the universal acceptance of the Ten Commandments even among the "heretics" of two thousand years ago.

III.

GOVERNMENTAL DISPLAYS ARE A PARTICULARLY NON-COERCIVE FORM OF STATE ACTION

In considering the merits of the constitutional challenge made in this case and in its companion, *McCreary County v. American Civil Liberties Union of Kentucky,* No. 03-1693, the Court should bear in mind that of the range of potential state actions in the sphere of religion, governmental displays are among the least likely to be coercive. In situations such as were presented in *Lee v. Weisman,* 505 U.S. 577 (1992), and *Santa Fe Indep. School Dist. v. Doe,* 530 U.S. 290 (2000), apparently voluntary participation in governmentally sponsored religious activity might pressure non-adherents to a religious faith – particularly school-age children -- to join in religious activity. Opponents of public financing of religiously affiliated institutions also contend that participants in the programs of such institutions might be proselytized or otherwise coerced into involuntary participation in religious exercises.

But these dangers are simply not present when government does no more than erect a display. Those who find the display offensive or who disagree with its message are, of course, free to look away. No one is pressured to say a prayer or to engage in any other form of religious observance by the mere presence of a display of the Ten Commandments. Justice Kennedy made this point succinctly in his separate opinion in *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573, 664 (1989):

> Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they

are free to do when they disagree with any other form of government speech.

The only conceivable threat that a display presents to a constitutional liberty protected by the First Amendment is one of perception – that it might appear to a reasonable observer that government is formally approving or "endorsing" the particular religion whose symbol is displayed. In neither of the cases before the Court is there any true danger of such "endorsement."

IV.

DISPLAY OF A MONUMENT OF ANY TEXT OR CONFIGURATION OF THE TEN COMMANDMENTS WITH NO ADDITIONAL "ENDORSEMENT" OF ANY PARTICULAR RELIGION IS CONSTITUTIONALLY PERMISSIBLE

Neither the record in this case nor the record in *McCreary County* supports the conclusion that the Ten Commandments display was an "endorsement" of any particular faith. To be sure, there are varying translations from the Hebrew and varying configurations of the Ten Commandments. The Catholic enumeration differs from the Jewish enumeration, and there are textual differences in the English translation of Protestant versions. Even the original Hebrew is chanted in the synagogue with different cantillations and sentence configurations at different occasions during the year.

These differences do not constitute an "endorsement" of any particular text or configuration. Obviously, if the Ten Commandments are to be displayed at all, one format must be selected for that display. Insofar as the display conveys the secondary secular message of the Ten Commandments

that we have previously discussed, the minutiae of the particular text are irrelevant. The secular theme of the display is the message that the Ten Commandments have been the historical foundation for a society based on a rule of law. Whether the Jewish enumeration of the Ten Commandments (which designate "You shall have no other gods beside me" as the beginning of the Second Commandment) or the Catholic enumeration (which begins the Second Commandment with "You shall not take the name of the Lord your God in vain") appears on the display, the secular message is the same.

Beyond the selection of a particular text, no form of "endorsement" is present in either record now before the Court. Nor is there any evidence whatever that government officials deliberately chose one text or configuration over another with the intention of endorsing a particular denomination. Such evidence of religious favoritism might, in our view, constitute impermissible "endorsement."

We also note that there was much attention paid in the decision below in this case to the context of the display. The Fifth Circuit noted that "[t]he Ten Commandments monument is part of a display of seventeen monuments, all located on grounds registered as a historical landmark, and it is carefully located between the Supreme Court Building and the Capitol Building housing the legislative and executive branches of government." 351 F.3d at 182.

Such an analysis of the context of a religious display is commanded by this Court's Establishment Clause jurisprudence. The Sixth Circuit in the *McCreary County* case went beyond these parameters, however, in requiring public officials actively to undertake special steps to secularize an otherwise non-denominational public display of the Ten Commandments.

The display in this case, as well as the displays sought to be provided by local government in *McCreary County*, satisfy the standards of the Establishment Clause of the First Amendment. This Court should affirm their constitutionality.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit in this case should be affirmed and the judgment of the Sixth Circuit in *McCreary County* should be reversed.

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January 2005

No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF RESPONDENTS

I. INTRODUCTION

In this brief, Pacific Justice Institute[1] will address the Question Presented by expanding upon the arguments it presented in the Brief on the Merits as *amicus curiae* in the companion Establishment Clause case of *McCreary County v. ACLU of Kentucky*, No. 03-1500.

Pacific Justice Institute is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest. Pacific Justice Institute has participated in litigation involving significant constitutional issues in both federal and state courts, including the Pledge of Allegiance case recently decided by this Court in *Elk Grove Unified School District v. Newdow*, 542 U.S. ___ (2004). In addition, Pacific Justice is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

II. SUMMARY OF ARGUMENT

The Capitol complex for the State of Texas was dedicated on May 16, 1888, and is comprised of twenty-two acres. Located on the Capitol grounds are several state

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[1] This brief is filed upon the written consent of the legal counsel for the Respondents, which has been lodged with the Clerk of this Court. On November 17, 2004 Petitioner filed a global Rule 37 consent for all prospective *amici*. Pursuant to Rule 37.6, *amicus curiae*, Pacific Justice Institute, and its counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authorized this brief in whole or in part and that no person other than counsel of record drafted the brief. No person or entity, other than *amicus*, made any monetary contribution to the preparation or submission of this brief.

buildings, including, but not limited to, the Texas Capitol, the Texas Supreme Court, and the State Library and Archives. Throughout the Capitol grounds are the following secular and religious monuments (including dates each was erected or unveiled):[2]

a. Heroes of the Alamo (1891);

b. Volunteer Firemen (1896);

c. Confederate Soldiers (1903);

d. Terry's Texas Rangers (1907);

e. Hood's Texas Brigade (1910);

f. Texas Cowboy (1925);

g. "The Hiker" (1951);

h. Statue of Liberty Replica (1951);

i. Veterans of the 36th Infantry (1959);

j. ***The Ten Commandments (1961)***;

k. World War I (1961);

l. Disabled American Veterans of Texas (1980);

m. Pea.. Harbor (1989);

n. Tribute to Texas Children (1998);

o. Texas Pioneer Woman (1998);

p. Korean War Veterans Memorial (1998); and

[2] Appendix 121 to this brief contains a Map (prepared by the Texas State Preservation Board), which shows the approximate locations of the Monuments on the Capitol Grounds; Appendix 122-123 contains a short description of each of the Monuments and the year each was erected. In addition, color photographs of all the Monuments located on the Capitol Grounds may be viewed on the Texas State Preservation Boards' Website at: www.tspb.state.tx.us/SPB/Gallery/MonList/MonuList.htm.

q. Texas Peace Officers Memorial (1999).

Although located on the Capitol grounds, the Ten Commandments Monument was donated by a non-governmental entity, to wit: the Fraternal Order of Eagles of Texas. (App. 124.) In addition to the Monuments, there are numerous plaques and seals, all of which display Texas' secular and religious history. *Van Orden v. Perry*, 351 F.3d 173, 175-176 (5th Cir. 2003) (*"Van Orden"*).

The Ten Commandments Monument is made of granite measuring six feet high and three and a half feet wide. (*See* color photograph at App. 127.)[3] The center section of the Monument contains a nonsectarian version of the text of the Ten Commandments. Above this section there are two tablets containing the Ten Commandments in their Hebrew version. Just below the Hebrew tablets and above the main section is an American eagle grasping the American Flag. Just below the main section are two Stars of David and the Greek letters Chi and Rho, which represent Christ. At the bottom of the Monument is the inscription of the dedication:

> "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961."

Id. at 176.

It is worth noting that the Texas Ten Commandments Monument and the other monuments, plaques, and seals

[3] **Permission to Publish:** This image may not be reproduced in any form without the permission of the State Preservation Board. *Contact* the curatorial department for more information.

depicting the secular and religious history of Texas are similar in nature to this Court's friezes on the north and south courtroom walls. As explained in an information sheet published by the Court's Office of the Curator, the friezes depict "a procession of 'great lawgivers of history' to portray the development of the law." The display includes, for example, such historic and religious figures as Hammurabi, King Solomon, Confucius, and Muhammad. Included within the friezes is **Moses holding two overlapping tablets – *the Ten Commandments***. (App. 1-7; *see, also*, Chief Justice Berger's comment in *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984).)

Interestingly, in addition to the secular symbols of the American eagle and American Flag, the Texas Ten Commandments Monument contains passages of the Bible and religious symbols subscribed to by followers of Judaism, Christianity, and Islam. Of course, this raises the question: which religion is being established or shown preference?

As this case is being argued before this Court on the same date as the Kentucky Ten Commandments case, *McCreary County v. ACLU of Kentucky*, No. 03-1500 ("*McCreary*"), this brief is designed to work in conjunction with the Brief on the Merits filed by *amicus* Pacific Justice Institute in the *McCreary* case. Although the issue was raised in Questions 3 and 4 in *McCreary* but not raised in the Question Presented in this case, *amicus* Pacific Justice Institute reiterates its suggestion in this brief that the Court should reconsider and overrule existing Establishment Clause jurisprudence starting with *Everson v. Board of Education*, 330 U.S. 1 (1947) ("*Everson*"),[4] through

[4] Although in cases decided before *Everson*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) ("*Cantwell*") and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) ("*Murdock*"), this Court indicated that the First

(Continued on following page)

Lemon v. Kurtzman, 403 U.S. 602 (1971) ("*Lemon*") and *Lemon's* progeny because the problems that presently exist are a direct consequence of the misapplication of the Selective Incorporation Doctrine applying the Establishment Clause to the States (*see, e.g., Everson*). Simply stated, the Court should take the opportunity presented in this case to overrule *Everson*, *Lemon*, and *Lemon's* progeny by holding that the Establishment Clause is ***not*** incorporated through the Fourteenth Amendment's Due Process Clause, and, therefore, ***not*** applicable to the several states.

In outline form, *amicus* Pacific Justice will present the following arguments in support of the foregoing suggestion.

First, the Establishment Clause should not be applied to the states through the Fourteenth Amendment's Due Process Clause because it is a restraint on federal power, rather than a source of a substantive individual right.

Second, *Everson*, *Lemon*, and *Lemon's* progeny have created an overt, nationwide hostility towards religion and religious persons, which requires them to be overruled in

Amendment was incorporated through the Fourteenth Amendment's Due Process Clause, those cases concerned the Free Exercise Clause (***not*** the Establishment Clause). It was not until *Everson* that this Court expressly held that the Establishment Clause was made applicable to the states by way of incorporation through the Fourteenth Amendment's Due Process Clause. *Everson*, *supra*, at 8. Consequently, nothing in this brief should be construed as urging that *Cantwell* or *Murdock* be overruled. This is because it is argued in this brief (as well as in Pacific Justice Institute's brief in *McCreary*) that the Free Exercise Clause, which is a substantive individual right, is incorporated and made applicable to the states; whereas, this brief argues that the Establishment Clause, which is a restraint on ***federal*** power only, is ***not*** incorporated and ***not*** applicable to the states.

order to maintain a meaningful right to the Free Exercise of Religion.

Finally, it is not constitutionally necessary to apply the Establishment Clause to the states because all fifty states have some form of restraint on the establishment and/or preference of religion in their individual state constitutions.

III. THE COURT SHOULD AFFIRM THE FIFTH CIRCUIT'S DECISION AND SHOULD OVERRULE *EVERSON* AND *LEMON* BECAUSE THE ESTABLISHMENT CLAUSE IS A *RESTRAINT* ON *FEDERAL* POWER AND IS *NOT* A SUBSTANTIVE INDIVIDUAL RIGHT, AND, THEREFORE, DOES *NOT* APPLY TO THE STATES

A. THE ESTABLISHMENT CLAUSE SHOULD *NOT* BE APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE BECAUSE IT IS A *RESTRAINT* ON *FEDERAL* POWER, RATHER THAN A SOURCE OF A SUBSTANTIVE INDIVIDUAL RIGHT

As was discussed in greater detail in Sections III.A and III.B of *amicus* Pacific Justice Institute's brief in the *McCreary* case, this Court's decisions in *Everson*, *Lemon*, and *Lemon's* progeny have created constitutional confusion in Establishment Clause jurisprudence and has resulted in an overt nationwide hostility towards religion and religious persons. The time has come for the Court to revisit the issue of whether the Establishment Clause should be applied to the states through the Fourteenth Amendment's Due Process Clause.

When viewed in light of past decisions by this Court, the two Religion Clauses of the First Amendment, the Free Exercise Clause[5] and the Establishment Clause,[6] *appear* to have between them a natural tension. However, when understood in their proper historical and substantive context, it is clear that they were intended to compliment one another for the express purpose of securing the most cherished of individual liberties: freedom of one to worship according to one's own conscience.

The proper way to analyze the interplay between the Establishment and Free Exercise clauses is to recognize that the former relates to a *restraint* on governmental *power*, whereas the latter *secures* a *substantive* ***individual*** right (i.e., freedom of religion). Simply stated, the Establishment Clause serves as a shield, protecting the Free Exercise Clause from governmental intrusion.

Viewing it from a constitutional perspective, the Free Exercise Clause is *substantive* in nature (i.e., secures an individual *right*), whereas the Establishment Clause is *structural* in nature (i.e., relates to government power, or restraint thereof). Understanding the Religion Clauses in this way will dispel the clouds of uncertainty presently surrounding Establishment Clause jurisprudence, to wit: the reason there is still confusion and a split in the Circuit Courts relative to application of Establishment Clause is because that clause is being interpreted and applied in a

---

[5] "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I ("Free Exercise Clause").

[6] "Congress shall make no law respecting an establishment of religion . . . " U.S. Const. amend. I ("Establishment Clause").

manner that is in direct contravention to its very nature and contrary to the intent of the Founders.

In summary, Sections III.A and III.B of *amicus* Pacific Justice Institute's brief in the *McCreary* case clearly demonstrate that the historical context in which the Establishment Clause was framed and adopted provides a comprehensive view of the nature and scope of the Establishment Clause. Perhaps it might be advantageous to state what the Establishment Clause is not. It is neither a restraint on the power of the states, nor a source of a substantive, individual right. Thus, the conclusion is inescapable: the Establishment Clause remains today what it was at the time of its adoption: a restraint on ***federal*** (not state) power. Even President Jefferson, in his handwritten draft of the famous letter to the Danbury Baptists, agreed that by adopting the Establishment Clause, Congress erected a *"wall of eternal separation between Church & State. **Congress thus inhibited from acts respecting religion . . .*** " (App. 90, emphasis added.)

B. *EVERSON*, *LEMON*, AND *LEMON'S* PROGENY HAVE CREATED AN OVERT, NATIONWIDE HOSTILITY TOWARDS RELIGION AND RELIGIOUS PERSONS, WHICH REQUIRES THEIR OVERRULING IN ORDER TO MAINTAIN A MEANINGFUL RIGHT TO THE FREE EXERCISE OF RELIGION

Present Establishment Clause jurisprudence has actually resulted in the Establishment Clause and Free Exercise Clause being at odds with one another (as opposed to working harmoniously as the Framers intended). Specifically, an overt hostility towards religion has spread throughout the nation in the wake of the vast misunderstandings

resulting from this Court's infamous history of Establishment Clause jurisprudence. This section is designed to bring to the Court's attention specific examples of how *Lemon* and its progeny have so confused Americans that the immediate reaction to religion and religious persons is one of fear and contempt, invariably resulting in the consistent denial of religious freedoms.

1. California and the Censorship of the Declaration of Independence and other Historical Documents

One recent example involves a California school district wherein a 5th grade public school teacher was ordered ***not*** to read to his students from, *inter alia*, the Declaration of Independence, George Washington's journal, and other historical papers, because of references made to God in those documents. Furthermore, the teacher was required to submit all of his supplemental materials to the principal ***before*** presenting them to his students (a procedure that was ***not*** required of any other teacher).

A civil complaint (*see* Appendix) challenging the school district's actions was filed on November 22, 2004 in the U.S. District Court for the Northern District of California (*Williams v. Vidmar, et al.*, U.S.D.C. No. C 04-4946). (App. 8-29.)

2. The Texas Public Schools and Holiday Celebrations

More recent examples come from a public school district in Texas. This past holiday season the Plano Independent School District issued a policy, whereby a

third grade boy was denied his right to pass out goody bags, which included candy canes with religious messages, to friends at their "winter" party, while secular gifts from other students were permitted. Parents were even told they could not hand out such messages to other parents at the party. (App. 100-110.)

A young girl was prohibited by Plano school officials from passing out pencils with "*Jesus*" written on them at a class birthday party, while other gifts with secular messages were permitted. In addition, another young girl was forbidden to invite her friends to an Easter event at her church. (App. 100-110.)

In December of 2004 the Plano school district sent a letter home with students requesting that parents not send their children to school with anything red or green this past holiday season. All cups, plates, napkins and icing must be white or the children will be in violation of the policy. (App. 100-110.)

So egregious were the Plano school district's hostile acts toward religious freedoms that on December 16, 2004 an investigation was initiated by the Civil Rights Division of the United States Department of Justice. (App. 92-93.)

Thereafter, on December 16, 2004 the injured students filed a civil complaint against the Plano school district and district officials in the U.S. District Court for the Eastern District of Texas, *Morgan v. The Plano Independent School District, et al.*, U.S.D.C. No. 4:04 CV 447. (App. 97-120.)

On December 16, 2004 U.S. District Judge Paul Brown issued a temporary restraining order against the

Plano school district restraining the district from enforcing its viewpoint based policies:

> "IT IS ORDERED that [the Plano school district and its officers and agents] be enjoined immediately:
>
> a. From interfering with or prohibiting [the students] from distributing ***religious* viewpoint** gifts to **classmates** at the December 17, 2004 'winter break' parties [in all schools in the Plano school district] . . . ;
>
> b. From interfering with or prohibiting Plaintiffs, Doug Morgan and Robin Morgan, from distributing ***religious* viewpoint** gifts to other **parents** at the December 17, 2004 'winter break' parties [in all schools in the Plano school district] . . . ;
>
> c. From committing any actions calculated to cause students to **feel *embarrassed*, *uncomfortable*, or *fearful*** because of a **student's exercise of a legal right** . . . "

(App. 95; emphasis added.)

Clearly, the Justice Department's investigation and the District Court's temporary restraining order were necessary because the Plano school district's and, as will be seen below, virtually all school districts' initial response to anything religious or to any religious person is hostility, which is invariably followed by the issuance of prior restraints. Obviously, the imposition of prior restraints in the first instance results in the evisceration of state and

federal constitutional rights to the Free Exercise of Religion and Freedom of Speech.

3. Other Examples of Overt, Nationwide Hostility Towards Religion and Religious Persons

In March 2004 a comprehensive compilation of this nationwide hostility towards religion and religious persons was submitted to the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights & Property Rights in testimony presented by constitutional law attorney Kelly Shackelford of Texas (a member of the Bar of this Court and who has argued before this Court). To assist the Court, Mr. Shackelford's comprehensive summary titled, *Examples of Hostility to Religious Expression in the Public Square* is set forth in the Appendix at pp. 30-81. The following are excerpts from the numerous examples encompassed in that document.

• ***From Lynn Lucas Middle School in Houston, Texas:***

A schoolteacher trashed two students' Truth for Youth Bibles and took the students to the principal's office where she threatened to call Child Protective Services on their parents for permitting them to bring their Bibles. Later at the same school, different officials threw away students' book covers with the Ten Commandments, claiming the commandments were hate speech and could offend students. (App. 30.)

• ***Girl Barred from Singing 'Kum Ba Yah,'* Washington Post, Aug. 14, 2000 at A2:**

An eight-year-old girl was barred from singing "Kum Ba Yah" at camp in a talent show because the song included the words "My Lord." The camp director said, " . . . You have to check your religion at the door." (App. 30-31.)

• **Joan Little, *City Schools Issue Rules About Students, Religion*, The St. Louis Post-Dispatch, July 11, 1996:**

Elementary school student Raymond Raines was "caught" praying over his meal at school. He was lifted from his seat and reprimanded in front of all the other students. He was then taken to the principal who ordered him to cease praying in school. (App. 31.)

• ***From Miami-Dade, Florida:***

Students tried to distribute business-sized cards to other students on the Miami-Dade Community College campus; the cards had a number for people to call where they could hear a recorded message about Jesus Christ. Campus security officers approached and told the students that they couldn't pass out the cards. Later, the students returned to resume handing out their cards and were approached by security officers and an administration official. When the students tried to leave, more security officers were summoned as was a police officer who threatened to arrest the students. A lawsuit had to be filed to protect the students' rights, and the school was barred from reviewing Christian literature. (App. 36-37.)

• ***From Boca Raton School District, Florida:***

Members of the Fellowship of Christian Athletes (FCA) were denied the opportunity to share a religious message on construction panels in the school as part of a beautification project. Though students were told that no profane or obscene messages were permitted, no policy was mentioned regarding religious messages. The students'

messages were edited to eliminate "God" and "Jesus." (App. 37.)

• ***From Walker County School District in Birmingham, Alabama:***

Eleven-year-old Kandice Smith was told that she was not permitted to wear her cross to school because it would violate the dress code at Curry Middle School. The dress code was devised to hinder gang activity at the school, and only after a lawsuit was filed did the school finally decide to incorporate an exception compatible with the Alabama Religious Freedom Amendment. (App. 34-35.)

• ***From Cushing Elementary School, Delafield, Wisconsin:***

Morgan Nyman, an eight-year-old student was denied the opportunity to share the Valentines that she had made by hand with her classmates because the Valentines included religious messages, which would "violate the separation of church and state" if little Morgan was permitted to hand them out. A lawsuit was filed to protect Morgan's rights, and the Kettle Moraine School District only relented after litigation, deciding to allow Morgan to pass the valentines out. (App. 35-36.)

• ***From the Boulder Valley School District, Colorado:***

For a class project, students were asked to select their favorite book for an oral book report. Eleven-year-old student Elizabeth Johnson selected the Bible, specifically Exodus, to share with the class, but the teacher rejected the student's choice, saying that the Bible may be "offensive" to some. Additionally, Elizabeth was told that she could not bring her Bible to school. An attorney became involved and sent a letter to the district explaining how

Elizabeth's rights had been violated, and a television station contacted the school about the events. Twenty minutes after the news called, the district relented and permitted Elizabeth to select the Bible as the subject of her book report. (App. 36.)

• ***From Asa Adams School in Orono, Maine:***

Third grader Gelsey Bostick wore a t-shirt and sweatshirt that said "Jesus Christ" on them, and her teacher asked her to turn both articles inside out because they were causing a commotion and offended one of the students. Furthermore, some students construed the words "Jesus Christ" as swear words. The school reversed itself only after a religious liberties law firm intervened. (App. 37.)

• **Frank J. Murray, *Federal Court Hears Lawsuit Over Kindergarten Christian; New York Schools May Relent, May Let Tot Say Grace at Meals*, The Washington Times, April 12, 2002:**

Kindergartner Kayla Broadus prayed, "God is good. God is great. Thank you, God, for my food," with two classmates at her school in Saratoga Springs, New York at the snack table before they ate their snack. Her teacher silenced the prayer, scolded Kayla and informed the school lawyer. (App. 39-40.)

• ***From Michigan:***

A Cornerstone University graduate student received a tuition grant from the state of Michigan. But when the student decided to pursue a Pastoral Studies divinity degree, the financial aid office of the university informed him that he was no longer eligible for the grant because it could not be used for divinity, theology, or religious instruction. In other

words, religious studies were being treated differently than other areas of study. (App. 41-42.)

• *Barrow v. Greenville ISD*, 332 F.3d 844 (5th Cir. 2003):

Karen Jo Barrow was denied an assistant principal position because she refused to remove her children from private, Christian school. A lawsuit was filed to protect her rights to select a religious education for her children without suffering repercussions for it at work in the public schools. Though the district court refused to uphold Barrow's parental rights to send her children to Christian school, the Fifth Circuit did and warded off this egregious religious discrimination on the part of the school district. (App. 42.)

• *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999):

Two Muslim police officers in Newark were required to shave their beards after the city issued an order requiring all police officers to be clean shaven. The order permitted a medical exemption, but not a religious exemption. The officers had to file a lawsuit to protect their constitutional right to free exercise of their religion. (App. 42.) In a unanimous opinion the Third Circuit rebuffed the Newark Police Department's policy:

> "This appeal presents the question whether the policy of the Newark (N.J.) Police Department regarding the wearing of beards by officers violates the Free Exercise Clause of the First Amendment. Under that policy, which the District Court held to be unconstitutional, exemptions are made for medical reasons (typically because of a skin condition called pseudo folliculitis barbae),

> but the Department refuses to make exemptions for officers whose religious beliefs prohibit them from shaving their beards. Because the Department makes exemptions from its policy for ***secular*** reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for ***religious*** reasons, ***we conclude that the Department's policy violates the First Amendment***. Accordingly, we affirm the District Court's order permanently enjoining the Department from disciplining two Islamic officers who have refused to shave their beards for religious reasons."

Id.(emphasis added).

• Diane Lynne, *Petition Posted to Defend 'God Bless America,'* WorldNetDaily, Jan. 31, 2003:

Military honor guardsman Patrick Cubbage was fired for saying "God bless you and this family, and God bless the United States of America" to families as he presented a folded flag in honor of a fallen veteran. Though the families did not object to the practice, Cubbage's co-guardsmen complained to their supervisor, and Cubbage was warned not to say the blessing to the families. Later Cubbage gave the blessing to a family after a request from the fallen veteran's son, and shortly thereafter Cubbage was fired for giving the blessing. (App. 44.)

• Ryan McCarthy, *School Rallies to Retain Sigh [sic]; The ACLU Says the Message 'God Bless America' Divides Kids by Religion and is Unconstitutional*, The Sacramento Bee, Oct. 6, 2001:

In the wake of Sept. 11, 2001, Breen Elementary School in Rocklin, California had a sign posted that said

'God Bless America,' and the ACLU intervened in an attempt to have the sign removed, calling it a clear violation of the U.S. and California constitutions and divisive. (App. 52-53.)

• ***From Crosby-Ironton High School in Crosby, Minnesota:***

The Crosby-Ironton High School censored the Lunch Bunch, a Christian group, from using fliers to describe their group and to promote the See You at the Pole event. A lawsuit was filed to protect the students' rights, the same rights afforded to other student organizations. (App. 53.)

• ***From South Tama Community School District, Iowa:***

The community center denied the Fellowship of Christian Athletes (FCA) access to facilities, so an FCA member complained and a demand letter was sent to the school district, informing them of the situation. Only then, did the school district back down and change their policy to stop discriminating against religiously affiliated groups. (App. 55.)

• ***From Mitchell County, Texas:***

The public library in Mitchell County, Texas tried to deny Rev. Seneca Lee access to a room to hold a meeting about political and social issues from a Christian Perspective because of a library policy that prevented religious groups from using the meeting room. After a lawsuit was filed, the library changed their policy of discriminating against religious groups. (App. 60.)

• **Terry Mattingly, *On Religion: Things Got Rough on Church-State Front This Holiday Season,* Naples Daily News, Jan. 17, 2004:**

The article chronicles the Christmas Season and the drama relating to public displays of celebration, including a story on firefighters in Glenview, Illinois who removed Christmas lights after neighbors complained of being offended. In addition, a pastor in Chandler, Ariz. complained that the public library display excluded Christmas and only included Hanukkah and Kwanzaa. The library took down the entire display, rather than augment the display with some information about Christmas. And in Tallahassee, Florida, a controversy erupted when a Jewish Chabad offered to help purchase a menorah for the courthouse yard and the ACLU threatened suit. (App. 67.)

4. Conclusion: In Order to Secure a Meaningful Right to the Free Exercise of Religion, The Court Must Correct the Negative Effects of *Lemon* and its Progeny

In all of the foregoing examples (and even more numerous ones set forth in App. 30-81), what is at work is a misapplication of the Establishment Clause that overshadows and abridges (if not destroys) the Free Exercise Clause. In all of these examples the first inclination of government officials is to issue a prior restraint on both the Free Exercise of Religion and Freedom of Speech. This case and the *McCreary* case present the perfect opportunity to correct the negative effects of *Lemon* and its legacy.

C. IT IS NOT CONSTITUTIONALLY NECESSARY TO APPLY THE ESTABLISHMENT CLAUSE TO THE STATES BECAUSE ALL FIFTY STATES HAVE SOME FORM OF RESTRAINT ON THE ESTABLISHMENT AND/OR PREFERENCE OF RELIGION IN THEIR INDIVIDUAL STATE CONSTITUTIONS

Inevitably, the overruling of *Everson*, *Lemon*, and *Lemon's* progeny begs the question: *What would fill the void created by the elimination of 57 years of Establishment Clause jurisprudence*? The fact is, eliminating Supreme Court review of non-federal Establishment Clause cases would **not** result in jurisprudential chaos or offend well-settled principles of *stare decisis* and continuity. The reason for this is that all fifty states have clauses in their state constitutions which prohibit the type of state involvement with religion that this Court has elected to review in the almost 60 years since the incorporation of the federal Establishment Clause against the states in *Everson*. In light of the fact that each of the states have already ensured that there is no legitimate concern regarding the establishment of individual state religions, there is no subsequent justification for the United States Supreme Court to continue exercising jurisdiction over non-federal Establishment Clause cases.

Fears that failure to incorporate the Establishment Clause against the states would result in states establishing official religions are mislaid. Twelve of the fifty United States have clauses in their constitutions which expressly prohibit the state legislature from establishing an official

church.[7] In each of those twelve, the language of their "establishment clause" either mirrors or very closely resembles the federal version.

In addition, a total of thirty-three states have constitutional provisions which forbid the government from exhibiting any preference for one religion or another.[8] In one example, California's *"No Preference Clause"* reads, "Free exercise and enjoyment of religion without discrimination *or preference* are guaranteed."[9] Notably, that particular provision has been interpreted by federal courts using the U.S. Supreme Court's Establishment Clause analysis as a touchstone.[10] This is evidence that the essential effect of that provision is the same as that of the federal Establishment Clause.

In fact, forty of the fifty U.S. states have either Establishment or No Preference Clauses, or both, in their state constitutions. Of the ten remaining states which do not have specific constitutional clauses relating to government establishment or preference for religion, seven have clauses which explicitly forbid expenditure of government funds for sectarian purposes. For example, the Arizona constitution uses the following verbiage in their so-called "No Aid" provision:

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[7] *See* App. 82-83, 86, 88, 89: AL, AK, CA, FL, HI, IA, LA, MT, NJ, SC, UT, and VA each have specific clauses forbidding a ***state's*** establishment of religion.

[8] App. 82-89: AL, AK, CA, CO, CT, DE, ID, IL, IN, KS, KY, ME, MA, MN, MS, MO, NE, NV, NH, NJ, NM, NY, NC, ND, OH, PA, SD, TN, TX, UT, VA, WV, and WI.

[9] CA Const. art. I, sec. 4 (emphasis added).

[10] *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 629 n.7 (9th Cir. 1996).

"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."[11]

This clause, as well as those like it in other state constitutions, have the same fundamental purpose and effect as an Establishment or No Preference Clause; ensuring that the state not excessively entangle itself or advance or inhibit a particular religion.

The three remaining states, Maryland, Rhode Island, and Vermont, have not failed to address the issue of state involvement with religion. All have constitutional clauses prohibiting the legislature from enacting laws relating to compulsory church attendance or involuntary support of sectarian causes. While stopping short of including provisions which specifically forbid laws respecting the establishment of religion, these three states each have constitutional provisions restraining the government's ability to coerce belief from its citizens or force them to support a particular religious faith against their conscience.

Chapter I, article 3 of the Vermont constitution declares in part:

"That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; *and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience* . . . "[12]

[11] AZ Const. art. II, sec. 12.

Likewise, the Maryland constitution holds

" . . . nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry . . . "[13]

The Rhode Island constitution similarly propounds

"[We], therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract;"[14]

It is reasonable to conclude that such provisions would preclude the establishment of an official state religion in each of the above states, even absent a specific Establishment or No Preference Clause. Were one of the above state legislatures to attempt to establish an official state religion, that action would inherently result in "support [for] a place of worship," "compel[ing] a citizen to contribute" (via tax dollars), or "support [for] a religious worship, place, or ministry" in contravention of the constitutional clauses detailed above.

The importance of the state constitutional limitations on establishment of religion is evident when analyzing the potential impact of a decision by this Court deciding to relinquish its practice of hearing allegations of state violations of the Establishment Clause. This Court will be

[12] VT Const. ch. I, art. 3 (emphasis added).

[13] MD Const. art. 36

[14] RI Const. art. I, § 3

comforted to know that should it decide to refuse to hear issues of alleged establishment clause violations by state actors, the well-settled principles of so-called "separation of church and state" would not crumble; on the contrary, they would remain as strong or stronger than when the Court exercised jurisdiction over those matters.

One method of illustrating this point is to examine several important historical Establishment Clause cases decided by this Court in light of the applicable state constitutional provisions rather than the Establishment Clause of the First Amendment. For instance, one can persuasively contend that the result in *Lemon* would not have been any different had the Pennsylvania State Supreme Court analyzed the Pennsylvania Nonpublic Elementary and Secondary Education Act under the terms of Pennsylvania's "No Preference Clause." The same consequence could have been achieved had the Pennsylvania Supreme Court decided that the Act exhibited a state preference "to [a] religious establishment" without ever necessitating United States Supreme Court review. Failure to invoke federal protections against state establishment of religion would not have resulted in an inability of aggrieved citizens to petition for redress; they could have simply done so under state constitution rather than the federal version.

Likewise, an examination of several other notable Supreme Court Establishment Clause decisions indicates similar results. In *School District of Abington Township, Pennsylvania. v. Schempp*, 374 U.S. 203 (1963) ("*Schempp*") the Pennsylvania Supreme Court again would have been competent to review allegations of inappropriate state entanglement with religion. Clearly, the state law at issue requiring that "passages from the Bible be

read or that the Lord's Prayer be recited in the public schools of a State at the Beginning of each school day"[15] would have been subject to intense scrutiny in light of the Pennsylvania constitution's mandate that "no preference shall ever be given by law to any religious establishments or modes of worship."[16] The same can likely be said for the City of Pittsburgh's holiday displays in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

Other notable historical Establishment Clause cases provide further evidence that states are competent to police their own involvement with religion. In *Engel v. Vitale*, 370 U.S. 421 (1962), the issue of school prayer could have been analyzed under the state of New York's No Preference Clause, which states, "*The free exercise and enjoyment of religious profession and worship,* ***without discrimination or preference****, shall forever be allowed in this state to all humankind* . . . "[17] In addition, the practice of state mandated or state sponsored prayer in New York public schools would also have likely run afoul of another New York constitutional provision, Article II, § 3, which states in part:

> "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, *or in*

[15] *Schempp, supra.*

[16] PA Const. art. I, § 3.

[17] NY Const. art. I, § 3

which any denominational tenet or doctrine is taught . . ."[18]

Other examples abound. The "moment of silent meditation or voluntary prayer" in *Wallace v. Jaffree,* 472 U.S. 38 (1985) could have been subject to Alabama's gauntlet of constitutional provisions forbidding excessive entanglement between the state and religion.[19] Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" could have been reviewed under Louisiana's state establishment clause rather than the federal version in *Edwards v. Aguillard,* 482 U.S. 578 (1987). Chaplaincy programs in Nebraska and prayer before football games in New Mexico also were ripe for analysis under their respective state constitutional Establishment and No Preference Clauses.

With respect to the two Establishment Clause cases on the Court's docket this term, the concept of reliance on state provisions for redress endures. While this Court will review Ten Commandments displays from Texas and Kentucky,[20] both of which have No Preference Clauses[21] in their state constitutions which would have afforded the petitioners in those cases an opportunity to have their claims regarding state involvement with religion heard in

[18] NY Const. art. II, § 3 (emphasis added).

[19] Alabama is one state which has constitutional provisions regarding all four of the areas of state involvement with religion; establishment, preference, expenditure of public funds, and compulsion. *See* Appendix 82.

[20] *McCreary County v. ACLU of Kentucky,* 03-1693, and *Van Orden v. Perry,* No. 03-1500.

[21] TX Const. art. I, § 6 and KY Const. § 5.

a viable alternative forum other than the U.S. Supreme Court.

As the foregoing demonstrates, it is clear that there is no legitimate concern that a decision by this Court "unincorporating" the Establishment Clause of the First Amendment against the states would result in the establishment of individual state religions. In light of that fact, coupled with the history of the ratification of the First and Fourteenth Amendments, there is no subsequent justification for the United States Supreme Court to continue exercising jurisdiction over non-federal Establishment Clause cases.

IV. CONCLUSION

A 1992 Harvard Law Review article argues that this Court should revisit the issue of whether the Establishment Clause should be applied to the states through the Fourteenth Amendment's Due Process Clause. One justification for non-incorporation of the Establishment Clause is the point of the original intent behind the adoption of the Establishment Clause:

> *"If the Establishment Clause is to be interpreted according to its original purpose, it is the* ***collective*** *intent of the people who ratified the Clause that must provide its meaning. In fact,* ***the only consensus*** *among the Framers of the First Amendment* [of which Jefferson was not one] *about the appropriate relationship between church and state* ***was to allow the states to decide the issue themselves.*** *Thus, the only theory of the Establishment Clause that accurately captures the collective intent of the Framers and reflects their divergent views is federalism. The*

language they chose accommodated both opponents and proponents of state establishments."

Rethinking the Incorporation of the Establishment Clause: A Federalist View, 105 Harv. L. Rev. 1700, 1705 (1992). The article makes this point because in *Everson*, Justice Black (who wrote the opinion) uses the Danbury Letter and other statements made by Madison and Jefferson to conclude that the Establishment Clause was intended to apply to the states. As stated in this article, and as demonstrated in this brief, *supra*, the record of the debates, including the statements of James Madison, demonstrate the complete opposite.

The Court should take this opportunity to reconsider the present state of Establishment Clause jurisprudence. In doing so, Pacific Justice urges that *Everson*, *Lemon*, and *Lemon's* progeny be overruled because they are in direct contravention of the Establishment Clause and the Fourteenth Amendment's Due Process Clause. The Court should make clear that neither this Court nor any circuit or district court should apply the Establishment Clause to the states.

Respectfully submitted,

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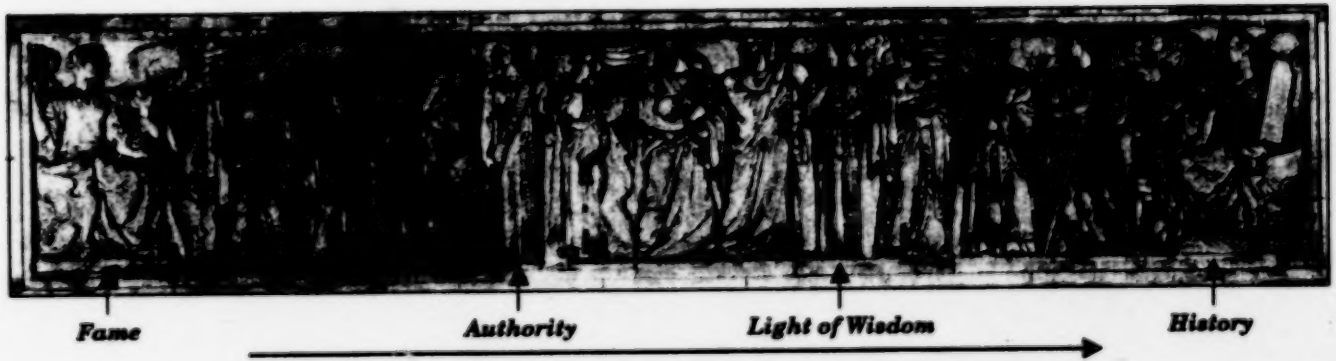
[Picture Of Supreme Court]

Courtroom Friezes: North and South Walls

INFORMATION SHEET

Cass Gilbert (1867-1934), architect of the Supreme Court building, selected Adolph A. Weinman (1870-1952), a respected and accomplished Beaux-Arts architectural sculptor, to design the friezes for the Courtroom during 1931 and 1932. Weinman's training emphasized a correlation between the sculptural subject and the function of the building. Gilbert relied on him to choose the subjects and figures that best reflected the function of the Supreme Court building. Faithful to classical sources and drawing from many civilizations, Weinman designed a procession of *"great lawgivers of history"* for the North and South walls to portray the development of law. Each frieze measures 40 feet long by 7 feet, 2 inches high and is made of ivory vein Spanish marble.

Weinman's sculpture begins on the south wall frieze with *Fame* and moves from **left to right.** Included among the great lawgivers are some allegorical figures whose names are included under the photographs in ***Italics.***



App. 2

Menes (c. 3200 B.C.) First King of the first dynasty of ancient Egypt. He unified Upper and Lower Egypt under his rule and is one of the earliest recorded lawgivers. Menes is shown in the frieze holding the *ankh,* an Egyptian symbol for life.

Hammurabi (c. 1700s B.C.) King of Babylon credited with founding the Babylonian Empire. He is known for the Code of Hammurabi, one of the earliest known legal codes. The first stone of the Code depicts him receiving the law from the Babylonian Sun God.

Moses (c. 1300s B.C.) Prophet, lawgiver and judge of the Israelites. Mosaic Law is based on the Torah, the first five books of the Old Testament. Moses is depicted in the frieze holding two overlapping tablets, written in Hebrew. Commandments six through ten are partially visible.

Solomon (c. 900s B.C.) King of Israel and renowned judge. His name, meaning "figure of the wise man," has become synonymous with "judicial wisdom."

Lycurgus (c. 800 B.C.) Legislator of Sparta. Lycurgus is credited with being one of the reformers of Sparta's constitution. He left Sparta after convincing the Spartan leadership not to change his laws until he returned, but he never did.

Solon (c. 638-558 B.C.) Athenian lawgiver. He was appointed *archon,* an officer of state, and was charged with remodeling the Athenian constitution in 594 B.C. He was instrumental in codifying and reforming Athenian law, often revising the laws of Draco. His name has come to mean "a wise and skillful lawgiver."

Draco (c. 600s B.C.) One of Solon's legal predecessors in Athens. Around 620 B.C., he committed an Athenian code

of laws to paper for the first time. His code included many strict penalties and death sentences, often for what seemed to be minor offenses. Thus, the word "draconian," meaning harsh or cruel, is derived from his name.

Confucius (551-478 B.C.) Chinese philosopher whose teachings stressed harmony, learning and virtue. Within 300 years of his death, the Chinese State adopted his teachings as the basis for government. Although officially abandoned by the Chinese government in 1912, Confucianism continues to have an influence throughout the world.

Octavian (63 B.C.-14 A.D.) or Augustus. First Emperor of the Roman Empire. He brought widespread reforms to many facets of Roman life. He supported the concept of using previous opinions of leading jurists to aid in determining new disputes.

The north wall frieze proceeds from **right to left,** starting with Philosophy:

Justinian (c. 483-565) Byzantine Emperor from 527 until his death. He ordered the codification of Roman law and published *Corpus Juris Civilis*. This work was instrumental in preserving Roman law and encompassed what has become known as the Justinian Code.

Muhammad (c. 570-632) The Prophet of Islam. He is depicted holding the Qur'an. The Qur'an provides the primary source of Islamic Law. Prophet Muhammad's teachings explain and implement Qur'anic principles. The figure above is a well-intentioned attempt by the sculptor, Adolph Weinman, to honor Muhammad and it bears no resemblance to Muhammad. Muslims generally have a strong aversion to sculptured or pictured representations of their Prophet.

Charlemagne (c. 742-814) or Charles I (the Great). King of the Franks and Roman Emperor. Charlemagne was reportedly an avid student who became an eloquent speaker of several languages and supported learning and literature throughout his realm. Under his leadership, most of Western Europe was united by 804 becoming the foundation for the Holy Roman Empire. He was also a reformer of legal, judicial and military systems.

King John (1166-1216) born John Lackland. King of England from 1199 until his death. His policies and taxation caused his barons to force him to sign the Magna Carta. This document, depicted in the frieze as a scrolled document in his hand, is regarded as the foundation of constitutional liberty in England.

Louis IX (c. 1214-1270) King of France who was canonized as St. Louis in 1297. He led the 7th and 8th Crusades and created the first court of appeals known as the "Curia Regis" or "King's Court."

Hugo Grotius (1583-1645) or Huig de Groot. Dutch scholar, lawyer and statesman. He is depicted holding *De jure belli ac pacis* (*Concerning the Law of War and Peace*), one of the first books on international law, which he wrote in 1625.

Sir William Blackstone (1723-1780) English law professor and jurist. He wrote *Commentaries on the Law of England* (1765-1769), which has had a major influence on English and American law.

John Marshall (1755-1835) Fourth Chief Justice of the United States, from 1801 to 1835. His 1803 opinion in *Marbury v. Madison* stated that the Supreme Court of the United States had the authority to determine the constitutionality of a law, establishing the power of judicial review for the Court.

Napoleon (1769-1821) Emperor of France from 1804 to 1815. He ordered and directed the recodification of French law into what became known as the Code Napoleon or Civil Code. Published in 1804, this code formed the basis for modern civil law. Napoleon, at St. Helena, is reported to have said, *"My glory is not to have won forty battles; for Waterloo's defeat will destroy the memory of as many victories. But what nothing will destroy, what will live eternally, is my Civil Code."*

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Updated: 8/18/2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA SAN JOSE DIVISION

STEPHEN J. WILLIAMS,

Plaintiff,

v.

PATRICIA VIDMAR, Principal of Stevens Creek School, WILLIAM BRAGG, Superintendent of Cupertino Union School District, PEARL CHENG, BEN LIAO, JOSEPHINE LUCEY, GARY MCCUE, GEORGE TYSON, Board members of Cupertino Union School District, in their official and individual capacities,

Defendants.

CASE NO. C-04-4946

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

(Filed Nov. 22, 2004)

Comes now the plaintiff, Stephen J. Williams, by and through counsel, pursuant to the Federal Rules of Civil Procedure and against the Defendants avers the following:

I.

INTRODUCTION

1. This case is about the First Amendment rights of Stephen Williams, a public school teacher and orthodox Christian. The Defendants have systematically censored Mr. Williams' choices of supplemental handouts because those handouts – chiefly excerpts of primary source

documents from America's founding era, or from state constitutions – contain some religious content. Defendants have ordered Mr. Williams (but no other current teacher) – to not distribute any supplemental handout unless it appears on a list of authorized handouts that applies only to Mr. Williams. This is a violation of the First and Fourteenth Amendments to the United States Constitution for which Mr. Williams seeks declaratory relief, injunctive relief, nominal damages, costs and attorneys' fees.

II.

JURISDICTION AND VENUE

2. This action arises under the United States Constitution, particularly the First and Fourteenth Amendments; and under federal law, particularly 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988.

3. This Court has original jurisdiction over these federal claims by operation of 28 U.S.C. §§ 1331 and 1343.

4. This Court has authority to issue the requested declaratory relief under 28 U.S.C. § 2201.

5. This Court has authority to issue the requested injunctive relief under 28 U.S.C. § 1343(a)(3).

6. This Court is authorized to award the requested damages under 28 U.S.C. § 1343(a)(3).

7. This Court is authorized to award attorneys' fees under 42 U.S.C. § 1988.

8. Venue is proper under 28 U.S.C. § 1391 in the Northern District of California because this claim arose there, and the parties reside within the District.

III.

INTRADISTRICT ASSIGNMENT

9. Pursuant to L.R. 3-2(e) & 3-5, this case is a civil rights case, in a non-excepted category, suitable for assignment to the San Jose division because the civil action arose in Santa Clara County.

IV.

IDENTIFICATION OF PARTIES

10. Plaintiff Stephen J. Williams is a resident of Mountain View, California.

11. Defendant Patricia Vidmar is Principal of Stevens Creek School, within the Cupertino Union School District. Among other things, this Defendant is responsible for setting the policies at Stevens Creek School and implementing the policies of Stevens Creek School and the Cupertino Union School District.

12. Defendant William Bragg is Superintendent of Cupertino Union School District. Among other things, this Defendant is responsible for setting and implementing policies for schools within the Cupertino Union School District.

13. Defendant Pearl Cheng is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

14. Defendant Ben Liao is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting

policies for schools within the Cupertino Union School District.

15. Defendant Josephine Lucey is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

16. Defendant Gary McCue is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

17. Defendant George Tyson is a member of the Board of Education of the Cupertino Union School District. Among other things, this Defendant is responsible for setting policies for schools within the Cupertino Union School District.

18. Each Defendant is sued in his or her individual and official capacities.

V.

STATEMENT OF FACTS

Background

19. Plaintiff Stephen J. Williams currently teaches fifth grade at Stevens Creek School ("the School"), which is part of Cupertino Union School District ("the District").

20. Defendant Patricia Vidmar is the Principal of the School.

21. Mr. Williams has taught for eight years in the District.

22. Mr. Williams has taught fifth grade for six years.

23. History and Social Studies are among the subjects that Mr. Williams teaches the fifth grade students at the School.

Conflicts Over Handouts and Lessons

24. The District's fifth grade History textbook is entitled "A New Nation: Adventures in Time and Place" ("textbook").

25. Mr. Williams frequently supplements the district-approved textbook with curriculum-related handouts for his students to understand the topic under study.

26. It is not uncommon for teachers within the District to supplement District textbooks with curriculum-related handouts.

27. Mr. Williams chooses supplemental handouts that, in his judgment as a professional educator, satisfy the California History-Social Science content standards for the fifth grade.

28. Many teachers employed by the District supplement the textbooks for each subject with curriculum-related handouts.

29. In his judgment as a professional educator, Mr. Williams cannot satisfy the California History-Social Science content standards for the fifth grade if he does not supplement the textbooks with handouts.

30. When teaching the history of the founding era, Mr. Williams includes original source documents from the founding era, or excerpts from such documents, as his supplemental handouts.

31. When teaching the history of the founding era, many of the documents Mr. Williams distributes as handouts contain references to God and Christianity.

32. Many original source documents from the founding era contain references to God and Christianity.

33. On or about May 19, 2004, Principal Vidmar ordered Mr. Williams to submit all of his lesson plans and supplemental handouts to her for review in advance.

34. Principal Vidmar reviewed Mr. Williams' lesson plans and curriculum-related handouts to determine whether either had religious content such that they would not be permissible for use in or for Mr. Williams' classes.

35. Since approximately May 19, 2004, Principal Vidmar has systematically rejected Mr. Williams' proposed lesson plans and proposed supplemental handouts that contain references to God or Christianity.

36. Mr. Williams is aware that one parent has complained about one handout during a lesson on Presidential Proclamations.

37. Mr. Williams gave a supplemental handout consisting of President George W. Bush's Proclamation on the National Day of Prayer as an example of a Presidential Proclamation. A true and correct copy of this handout is attached as Exhibit A.

38. Other teachers are not required to submit all of their lesson plans and supplemental handouts to Principal Vidmar in advance.

39. Other teachers are permitted to show films and distribute handouts containing references to God.

40. Principal Vidmar has rejected Mr. Williams' attempts to distribute, among others:

a. Excerpts from the "Frame of Government of Pennsylvania" by William Penn;

b. Excerpts from the Declaration of Independence;

c. Excerpts from various state constitutions;

d. A handout entitled "What Great Leaders Have Said About The Bible";

e. "The Rights of the Colonists" by Samuel Adams;

f. Excerpts from George Washington's journal;

g. Excerpts from John Adams' diary;

h. Excerpts from "The Principles of Natural Law" by Jean-Jacques Burlamaqui;

i. A handout entitled "Fact Sheet: Currency & Coins – History of 'In God We Trust.'"

True and correct copies of these handouts are attached as Exhibits B-J.

41. Mr. Williams intended to distribute these handouts to explain 1) the role of religion at the nation's founding; 2) the religious references in several founding documents including the Declaration of Independence; and

3) the reasons for the Establishment Clause in the First Amendment.

42. Principal Vidmar rejected the documents referenced in Paragraph 41 because of their religious content.

43. Approximately five percent of all of Mr. Williams' supplemental handouts distributed throughout the school year contain references to God or Christianity.

44. In November 2003, Mr. Williams taught a lesson on the origins of Thanksgiving.

45. In December 2003 and January 2004, Mr. Williams taught lessons on the origins of religious holidays, including Christmas, Ramadan, Diwali, Hanukah, and the Chinese New Year.

46. Principal Vidmar did not object to the lessons about Thanksgiving or the religious holidays.

47. In April 2004, Mr. Williams intended to teach a lesson about the religious holiday of Easter.

48. Principal Vidmar ordered Mr. Williams not to teach a lesson about Easter.

49. Principal Vidmar gave this order because Easter is a Christian religious holiday.

50. Mr. Williams is a Christian, and generally adheres to orthodox Christian beliefs as prescribed by the Bible.

51. One of Mr. Williams' Christian beliefs is that he must submit to governing authorities.

52. Mr. Williams understands and admits that he is not permitted to "proselytize" or seek to convert his students to Christian beliefs during instructional time.

53. Mr. Williams does not attempt to proselytize his students during instructional time.

54. Other than the religious references that occasionally occur in his lesson plans and supplemental handouts during the school year, Mr. Williams does not distribute religious material during instructional time.

55. Other than religious references that occasionally occur in his lesson plans and supplemental handouts, or in response to questions by students, Mr. Williams does not discuss religion during instructional time.

56. Mr. Williams has distributed his chosen handouts during previous school years without any problems.

57. Principal Vidmar is aware that Mr. Williams is a Christian.

58. At the beginning of the 2003-04 school year, Principal Vidmar communicated to Mr. Williams her concern that Mr. Williams would try to proselytize his Christian faith to the students in his classroom.

59. Mr. Williams communicated to Defendant Vidmar that, because of his religious belief regarding submission to authority, he does not attempt to proselytize his students during instructional time.

California State Law

60. California Education Code § 51511 states:

> Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, dance, music, theatre, and visual arts or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental to or illustrative of matters properly included in the course of study.

61. On its face, California Educational Code § 51511 permits, *inter alia*, "religious literature" and "other things having a religious significance" as part of the school curriculum.

California's History-Social Science Content Standards

62. The California Department of Education has promulgated content standards for fifth grade curriculum taught in California public schools, including the District's schools.

63. The District's schools are required to educate fifth grade students according to the State's content standards.

64. The California Department of Education has published the content standards governing history and the social sciences as part of a book entitled "History-Social Science Framework for California Public Schools Kindergarten through Grade Twelve" ("Framework").

65. In that book, the History-Social Science Content Standards for Grade Five are entitled "United States History and Geography: Making a New Nation." A true and correct copy of these standards (including the cover pages of the Framework) is attached as Exhibit K.

66. The introduction to the History-Social Science Content Standards for Grade Five state: "This course focuses on one of the most remarkable stories in history: the creation of a new nation . . . founded on the Judeo-Christian heritage. . . ." Ex. K at 64.

67. This nation was founded on the Judeo-Christian heritage.

68. Standard 5.2.2 states "Explain . . . the reasons Europeans chose to explore and colonize the world (e.g., the Spanish Reconquista, the Protestant Reformation, the Counter Reformation)." *Id.* at 71.

69. Standard 5.4 requires that "Student understand the political, religious, social, and economic institutions that evolved in the colonial area." *Id.* at 72.

70. Standard 5.4.2 states: "Identify the major individuals and groups responsible for the founding of the various colonies and the reasons for their founding (e.g., . . . William Penn, Pennsylvania. . . .)." *Id.*

71. Standard 5.4.3 states: "Describe the religious aspects of the earliest colonies (e.g., Puritanism in Massachusetts, Anglicanism in Virginia, Catholicism in Maryland, Quakerism in Pennsylvania)." *Id.*

72. Standard 5.4.4 states: "Identify the significance and leaders of the First Great Awakening, which marked a shift in religious ideas, practices, and allegiances in the

colonial period, the growth of religious toleration, and free exercise of religions." *Id.*

73. Standard 5.5.1 states: "Understand how political, religious, and economic ideas and interests brought about the Revolution. . . . " *Id.*

74. Standard 5.7.6 states: "Know the songs that express American ideals (e.g., 'America the Beautiful,' 'The Star Spangled Banner')."

75. The Framework contains a list of "analysis skills" in conjunction with the content standards. Ex. K at 75.

76. The analysis skills under "Research, Evidence, and Point of View" require that:

> 1. Students differentiate between primary and secondary sources.
>
> 2. Students pose relevant questions about events they encounter in historical documents, eyewitness accounts, oral histories, letters, diaries, artifacts, photographs, maps, artworks, and architectures.
>
> 3. Students distinguish fact from fiction by comparing documentary sources on historical figures and events with fictionalized characters and events.

Id.

77. On their face, the California History-Social Science Content Standards require, *inter alia,* teaching about religion.

78. Appendix C of the Framework discusses teaching about religion in public schools. *Id.* at 203.

79. Appendix F of the Framework discusses the importance of using primary source documents. *Id.* at 214.

Cupertino Union School District Content Standards

80. The District has promulgated content standards for fifth grade curriculum taught in District schools.

81. Standard 4 under "United States History and Geography: Making a New Nation" requires that: "Students understand the political, religious, social, and economic institutions that evolved in the colonial era."

82. On their face, the District's content standards require, *inter alia,* that students receive objective instruction about religion.

Textbook Inadequacies

83. The District's textbook contains nothing about the Spanish Reconquista, the Protestant Reformation, or the Counter Reformation.

84. The District's textbook contains the following statements in its entire discussion about the Great Awakening: "The Great Awakening's goal was to strengthen people's religious beliefs and feelings. It widened the differences between several Protestant groups."

85. The textbook contains nothing on the religious ideas that motivated the Revolution or the religious origins of the concepts in the Declaration of Independence and the Bill of Rights.

86. The textbook contains nothing on the state constitutions' influence on the federal constitution.

87. These inadequacies, among others, are the reasons that Mr. Williams supplements the textbook with handouts in order to fulfill California's History-Social Science Content Standards.

VI.

STATEMENTS OF LAW

88. Each and all of the acts alleged herein were done by Defendants under the color and pretense of state law, statutes, ordinances, regulations, customs, usages, and policies of Cupertino Union School District, Santa Clara County, and the State of California.

89. Teachers do not shed their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

90. Teachers have academic freedom rights within the reasonable limits of the state's education content standards.

91. Defendants have a duty to set education policies and local content standards in accordance with the state's education content standards.

92. By their policy of excluding all of Mr. William's handouts containing religious references, Defendants have failed to meet their duty.

93. Unless and until the enforcement of the Defendants' religiously discriminatory policy is enjoined, the

Plaintiff will suffer and continue to suffer irreparable harm to his federal constitutional rights.

VII.

FIRST CAUSE OF ACTION – VIOLATION OF THE EQUAL PROTECTION CLAUSE UNDER THE UNITED STATES CONSTITUTION

94. The allegations contained in all preceding paragraphs are incorporated herein by reference.

95. The Equal Protection Clause requires that the government treat similarly-situated persons equally.

96. The Defendants allowed similarly-situated teachers to include religious expression in their lessons and supplemental handouts.

97. The Defendants do not require similarly-situated teachers to submit their lesson plans and supplemental handouts in advance.

98. The Defendants do not limit similarly-situated teachers' choices of supplemental handouts as they have limited Mr. Williams' choices.

99. The Defendants have treated Mr. Williams differently based on the exercise of his fundamental right to free speech.

100. Defendants have no compelling interest to justify their unequal treatment of Mr. Williams.

101. The Defendants' policy therefore violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

VIII.

SECOND CAUSE OF ACTION - VIOLATION OF THE RIGHT TO FREEDOM OF SPEECH UNDER THE UNITED STATES CONSTITUTION

102. The allegations contained in all preceding paragraphs are incorporated herein by reference.

103. Speech about religion is protected by the First and Fourteenth Amendments to the United States Constitution.

104. Speech about religion is necessary to fulfill the state teaching standards.

105. Defendants have excluded Mr. Williams' speech because of its religious content and viewpoint.

106. Specifically, Defendants have excluded the viewpoint that this nation has a Christian history.

107. By this exclusion, Defendants have, *inter alia,* limited Mr. Williams' academic freedom – his ability to speak and teach freely in accordance with the state educational standards.

108. Regardless of the type of forum (traditional, designated or limited, or nonpublic fora), the government may not discriminate based upon the viewpoint expressed by the speaker.

109. The Defendants have no compelling government interest to justify their discriminatory treatment of the Plaintiff.

110. The Defendants' actions therefore violate the Free Speech Clause of the First Amendment to the United States Constitution as incorporated and applied to the states under the Fourteenth Amendment.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

IX.

THIRD CAUSE OF ACTION – VAGUENESS

111. The allegations contained in all preceding paragraphs are incorporated herein by reference.

112. Defendants' policy and practice do not give adequate notice as to what conduct is prohibited.

113. Defendants' policy and practice vest unfettered discretion in school officials to control teacher speech based on its content and viewpoint.

114. Defendants' policy and practice contradict state law.

115. Defendants have no compelling interest to justify their policy and practice.

116. Defendants' policy and practice are therefore void for vagueness in violation of the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

X.

FOURTH CAUSE OF ACTION – VIOLATION OF THE ESTABLISHMENT CLAUSE UNDER THE UNITED STATES CONSTITUTION

117. The allegations contained in all preceding paragraphs are incorporated herein by reference.

118. The Defendants' policy and practice excludes Mr. Williams' religious expression.

119. The Defendants' policy requires that school officials systematically and regularly scrutinize historical documents to determine whether the officials consider the documents to have religious content that the officials consider impermissible within their school.

120. The Defendants' policy demonstrates impermissible hostility towards religion.

121. Defendants have no compelling interest that would justify their hostility towards religion.

122. The Defendants' policy therefore violates the Establishment Clause of the First Amendment to the United States Constitution as incorporated and applied to the states under the Fourteenth Amendment.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth hereinafter in the prayer for relief.

XI.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

A. That this Court preserve the pre-litigation status quo by preliminarily enjoining the Defendants from ceasing their practice of allowing teachers to distribute curriculum-related supplemental handouts;

B. That this Court preliminarily and permanently enjoin the Defendants from enforcing their policy and practice of suppressing Mr. Williams' use of curriculum-related supplements on the basis that they contain religious content or references;

C. That this Court enter declaratory judgment stating that the Defendants' policy and practice is facially unconstitutional and violates the Plaintiff's rights as guaranteed under the First and Fourteenth Amendments to the United States Constitution;

D. If the policy is not declared facially unconstitutional, that this Court enter a declaratory judgment stating that the policy is unconstitutional as applied to the Plaintiff and violates the Plaintiff's rights guaranteed under the First and Fourteenth Amendments to the United States Constitution;

E. That this Court award Plaintiff nominal damages arising from the acts of the Defendants as an important vindication of the constitutional rights at stake;

F. That this Court award Plaintiff his costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988 and other applicable law;

G. That this Court grant such other and further relief as the Court deems equitable, just, and proper;

H. That this Court adjudge, decree and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment; and

I. That this Court retain jurisdiction of this matter as necessary to enforce the Court's orders.

Respectfully submitted on this, the 22nd day of November, 2004,

Attorney for Plaintiff, _

By: /s/ Terry L. Thompson
Terry L. Thompson

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Respectfully submitted on this, the 22nd day of November, 2004.

By: /s/ Terry L. Thompson
Terry L. Thompson

VERIFICATION

I, Stephen J. Williams, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Complaint for Declaratory and Injunctive Relief and Damages and declare under the penalty of

perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 28 day of October, 2004

/s/ Stephen J. Williams 6/20/04
Stephen J. Williams

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EXAMPLES OF HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

REPORTED CASES, MEDIA ARTICLES, UNREPORTED CASES, AND LAW REVIEW ARTICLES

(Some of these cases were resolved correctly, many not, but they all show the hostility to religious freedom currently ongoing nationwide)

- *From Lynn Lucas Middle School in Houston, Texas:*

  A schoolteacher trashed two students' Truth for Youth Bibles and took the students to the principal's office where she threatened to call Child Protective Services on their parents for permitting them to bring their Bibles. Later at the same school, different officials threw away students' book covers with the Ten Commandments, claiming the commandments were hate speech and could offend students.

- *Girl Barred from Singing 'Kum Ba Yah,'* Washington Post, Aug. 14, 2000 at A2.

  An eight-year-old girl was barred from singing "Kum Ba Yah" at camp in a talent show because the song

included the words "My Lord." The camp director said, " . . . You have to check your religion at the door."

- Conrad deFiebre, *Suit Claims Man's Religious Freedom is Being Thwarted; A Revenue Employee Says He's Not Allowed to Display Signs on His Car or Cubicle,* Star Tribune (Minneapolis), July 2, 2004, at 3B.

  A Minnesota state Department of Revenue employee Alan Blackburn was barred from parking his car in the state parking lot because of religious and political stickers placed on the car (examples include: "God is a loving and caring God," "God defines marriage as a union between a man and a woman. He also says sex is to be enjoyed between a husband and wife only"). A lawsuit was filed in support of Blackburn's rights to place whatever stickers he wants on his car.

- Joan Little, *City Schools Issue Rules About Students, Religion,* The St. Louis Post-Dispatch, July 11, 1996.

  Elementary school student Raymond Raines was "caught" praying over his meal at school. He was lifted from his seat and reprimanded in front of all the other students. He was then taken to the principal who ordered him to cease praying in school.

STUDENTS

- *C.H. v. Oliva,* 226 F. 3d 198 (3d Cir. 2000).

  Zachary Hood brought his Beginner's Bible to school to share a story about Jacob and Esau called "A Big Family" as part of class activities, but Zachary's teacher refused to allow the story to be read because it was religious. Zachary's mom filed a lawsuit to allow Zachary to share his story just as the other students were permitted to share theirs.

- *Walz v. Egg Harbor Township,* 342 F.3d 271 (3d Cir. 2003).

  A pre-kindergarten student, Daniel Walz, was prevented from giving out pencils with the message "Jesus Loves the Little Children" engraved on them and later as a first grader was prevented from distributing candy canes with "The Candy Maker's Witness" attached to the candy. A lawsuit was filed to protect Daniel's rights to give gifts at school just like other children could, but the Third Circuit refused to uphold Daniel's rights to give his gifts and instead decided in favor of the school's discrimination.

- *Denooyer v. Merinelli,* 1993 U.S. App. LEXIS 20606 (August 3, 1993).

  When elementary student Kelly Denooyer was selected as her class' VIP of the Week, she brought a video of her singing a solo at church to share with her class. But the teacher refused to play the tape for a variety of reasons, including concern about the videotape's religious message. A lawsuit was filed to protect Kelly's rights, but the court determined that Kelly's free expression rights were not violated by the censorship of her video.

- *Settle v. Dickson County Sch. Bd.,* 53 F.3d 152 (6th Cir. 1995).

  Ninth grader Brittney Settle selected Jesus Christ as the topic for her open research project, but her teacher later refused to approve the subject and gave Brittney a zero for her grade and did not permit her to submit another project. A lawsuit was filed to protect Brittney's free expression rights, but the court refused to uphold Brittney's rights and found in favor of the school.

- *Westfield High Sch. L.I.F.E. Club v. City of Westfield,* 249 F. Supp. 2d 98 (D. Mass. 2003).

  A student started a religious club and wanted to hand out candy canes with a religious message at school. The school denied the students' permission and the students were suspended for distributing their candy canes. The students were forced to file suit in federal court in order to enforce their right to give candy to classmates without facing suspension.

- *Duran v. Nitsche,* 780 F. Supp. 1048 (E.D. Pa. 1991).

  Fifth grader Diana Duran was a member of the Academically Talented Program, where she was assigned an independent study project. She completed the project on the Power of God as originally approved by her teacher. However, when doing her research (including a student survey of classmates' religious beliefs) and attempting to present her project to the class (as part of the assignment), school officials intervened and prevented Diana from successfully completing the project. Diana along with her guardians filed a lawsuit to protect her First Amendment freedoms, but the court did not uphold her rights and upheld the school's action, saying she had no such rights in the classroom.

- *Hsu v. Roslyn Union Free Sch. Dist.,* 85 F.3d 839 (2d Cir. 1996).

  Students Emily and Timothy Hsu wanted to form a student Bible club at school, but were denied club recognition because the students insisted that the club have a policy permitting only Christians to serve as officers. A lawsuit was filed to protect the clubs' right to pick leaders in accordance with their faith. The court only permitted certain leadership positions to have a requirement relating to the member's faith

and would not permit all leadership positions to have such a requirement.

- *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)

  Through the Individuals with Disabilities Education Act (IDEA), a deaf student was entitled to access to a sign-language interpreter during the school day, so the student asked the Catalina Foothills School District to provide such an interpreter. The student attended Catholic school, and the district refused to provide an interpreter. A lawsuit had to be filed to uphold this religious student's rights.

- *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

  University of Utah acting student Christina Axson-Flynn withdrew from the acting program and left the university after her instructors heavily pressured her to perform scenes that required her to say profane words. Axson-Flynn was a Mormon and had informed the instructors of her religious objections to profane phrases during her audition for acceptance to the acting program.

- *From Northwest Elementary School in Massachusetts*

  Seven-year-old Laura Greska brought a book called *The First Christmas* to fulfill an assignment that asked students to share with the class about their family's Christmas traditions, but was forbidden from sharing it with the class because it was "religious" as it centered on Jesus Christ's birth.

- *From Walker County School District in Birmingham, Alabama:*

  Eleven-year-old Kandice Smith was told that she was not permitted to wear her cross to school because it would violate the dress code at Curry Middle School.

The dress code was devised to hinder gang activity at the school, and only after a lawsuit was filed did the school finally decided to incorporate an exception compatible with the Alabama Religious Freedom Amendment.

- *From Kettering City School District, Ohio:*

  A teacher prevented a kindergartener from giving out bags of jelly beans with a religious poem to classmates around Easter 2003. She was trying to uphold a school policy against students distributing religious literature in the classroom, though secular messages are permitted. A lawsuit was filed in U.S. District Court in Ohio.

- *From the Flagstaff, Arizona Unified School District:*

  Sixth-grader Caitlin Ribelin wanted to tell classmates about her church youth group, but her school principal prevented her from doing so because of school policies preventing distribution of religious materials not authored by students. A lawsuit had to be filed against the school district to allow religious literature to be treated the same way that secular literature is treated.

- *From Muskogee Public School District, Oklahoma:*

  An 11-year-old Muslim student was suspended for wearing her religious hair covering to school, in violation of the school's dress code. A lawsuit was filed to protect the student's religious rights in federal court in Oklahoma, and the school district finally decided to settle after the U.S. Department of Justice opened an investigation.

- *From Cushing Elementary School, Delafield, Wisconsin:*

  Morgan Nyman, an eight-year-old student was denied the opportunity to share the valentines that she had

made by hand with her classmates because the Valentines included religious messages, which would "violate the separation of church and state" if little Morgan was permitted to hand them out. A lawsuit was filed to protect Morgan's rights, and the Kettle Moraine School District only relented after litigation, deciding to allow Morgan to pass the valentines out.

- *From the Boulder Valley School District, Colorado:*

  For a class project, students were asked to select their favorite book for an oral book report. Eleven-year-old student Elizabeth Johnson selected the Bible, specifically Exodus, to share with the class, but the teacher rejected the student's choice, saying that the Bible may be "offensive" to some. Additionally, Elizabeth was told that she could not bring her Bible to school. An attorney became involved and sent a letter to the district explaining how Elizabeth's rights had been violated, and a television station contacted the school about the events. Twenty minutes after the news called, the district relented and permitted Elizabeth to select the Bible as the subject of her book report.

- *From Miami-Dade, Florida:*

  Students tried to distribute business-sized cards to other students on the Miami-Dade Community College campus; the cards had a number for people to call where they could hear a recorded message about Jesus Christ. Campus security officers approached and told the students that they couldn't pass out the cards. Later, the students returned to resume handing out their cards and were approached by security officers and an administration official. When the students tried to leave, more security officers were summoned as was a police officer who threatened to arrest the students. A lawsuit had to be filed to protect the students' rights, and the school was barred

from reviewing Christian literature and could prevent its distribution only in limited circumstances.

- *From Boca Raton School District, Florida:*

  Members of the Fellowship of Christian Athletes (FCA) were denied the opportunity to share a religious message on construction panels in the school as part of a beautification project. Though students were told that no profane or obscene messages were permitted, no policy was mentioned regarding religious messages. The students' messages were edited to eliminate "God" and "Jesus." A lawsuit was filed.

- *From Asa Adams School in Orono, Maine:*

  Third grader Gelsey Bostick wore a t-shirt and sweatshirt that said "Jesus Christ" on them, and her teacher asked her to turn both articles inside out because they were causing a commotion and offended one of the students. Furthermore, some students construed the words "Jesus Christ" as swear words. The school reversed itself only after a religious liberties law firm intervened.

STUDENT PRAYER

- *Goulba v. Sch. Dist. of Ripon,* 45 F.3d 1035 (7th Cir. 1995).

  After students recited the Lord's Prayer, on their own accord, before the opening of graduation ceremonies, student Nikki Goulba filed a civil contempt motion against the School District of Ripon and the Ripon High School principal, claiming that the officials violated a permanent injunction that prevented them from permitting prayer during school graduations.

- *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996).

  A lawsuit was filed challenging a school policy that permitted the graduating class to vote to determine if there would be student-led prayer during graduation ceremonies. The court struck down the policy, determining it violated the Establishment Clause and enjoined the school from permitting the prayer.

- *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).

  Lawsuit filed to challenge a school policy permitting high school seniors to use a popular vote to select a graduation speaker who could deliver a message of their choosing, without approval by school officials. The offense was that some students would use their time of speech to express religious thoughts.

- *Candler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

  A principal and student filed suit to challenge an Alabama statute, which allowed student-initiated prayer during school events.

- *Geardon v. Loudon County Sch. Bd.*, 844 F. Supp. 1097 (E.D Va. 1993) (mem.).

  Parents and students filed a lawsuit challenging prayer at a high school graduation, and the court permanently enjoined the school from permitting prayer at graduation ceremonies.

- *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

  A Clear Creek ISD parent filed suit to challenge a policy permitting high school seniors to select student volunteers to give nonsectarian, non-proselytizing invocations at graduation ceremonies.

- *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

  Two students brought suit challenging the practice of having a supper prayer at a military school in Virginia on the grounds that it violated the Establishment Clause and the court struck down the practice.

- *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

  A lawsuit was filed to challenge a school district policy permitting student-led, student-initiated prayer prior to football games, and the court struck down the policy, determining it violated the Establishment Clause. In the lower court in this same case, the judge ordered students not to pray in Jesus' name and told them that federal marshals would be on hand to take students to the Galveston County Jail, saying "Anyone who violates these orders, no kidding, is going to wish that he or she had died as a child when this court gets through with it."

- *Lee v. Weisman*, 505 U.S. 577 (1992).

  In Providence, Rhode Island, principals of public school were permitted to ask clergy to give invocations and benedictions at graduation exercises, but when a middle school principal invited a rabbi to give a nonsectarian prayer, a student's parent got a temporary restraining order to prevent the prayer and sought a permanent injunction to prevent the practice of inviting clergy to perform prayers in the future.

- *Wallace v. Jaffree*, 472 U.S. 38 (1985).

  A lawsuit was filed to challenge the practice of having a period of meditation and voluntary prayer in schools in Alabama.

- Frank J. Murray, *Federal Court Hears Lawsuit Over Kindergarten Christian; New York Schools May*

Relent, May Let Tot Say Grace at Meals, The Washington Times, April 12, 2002.

Kindergartner Kayla Broadus prayed, "God is good. God is great. Thank you, God, for my food," with two classmates at her school in Saratoga Springs, New York at the snack table before they ate their snack. Her teacher silenced the prayer, scolded Kayla and informed the school lawyer. A lawsuit ensued over the child's prayer.

- *From Aledo Independent School District, Aledo, Texas:*

  Katherine Furley was elected to pray at her graduation ceremony, but then was ordered to submit her prayer to officials. School officials then proceeded to edit, word by word, which words she could and could not pray. A lawsuit was filed to protect Katherine's right to pray without being edited by the government. The Court ruled against her right to pray without government editing.

- *From Norfolk High School, Nebraska:*

  After graduating seniors voted to have prayer in their graduation, a student complained to the ACLU, who threatened legal action against the school if they permitted the prayer. At the graduation ceremony, school officials announced that there would be no praying during the ceremony.

SCHOLARSHIP AWARDS AND VOUCHERS

- *Locke v. Davey,* ___ U.S. ___, 124 S. Ct. 1307 (2004).

  Josh Davey received a Promise Scholarship, which was awarded to academically gifted students with postsecondary education expenses, to use at any college in the state. He decided to pursue a double major in pastoral ministries and business management/administration.

Davey was told that he could use the scholarship for any major unless he was devoted to become a pastor. The Court ruled against him.

- *Eulitt v. Me. Dep't of Educ.,* 307 F. Supp. 2d 158 (D. Me. 2004).

  Though Maine state law requires free public education for kindergarten through 12th grade, the town of Minot only has schooling through the eighth grade, and the town has contracted to send their students elsewhere for high school, public school or other schools if the student has "educational program requirements that may not be offered in association with PRHS." A Minot family was denied access to public funding for child's tuition to Catholic high school, despite the fact that the state had the authority to approve payments to alternative schools, and a lawsuit was filed.

- *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

  An Ohio voucher program was enacted because the public school system was in a "crisis of magnitude," and families were given voucher funds to use toward a school of their choosing. Many families elected to use their vouchers for religious schools, and as a result, a lawsuit was filed to challenge the program, claiming it established religion.

- *From Michigan:*

  A Cornerstone University graduate student received a tuition grant from the state of Michigan. But when the student decided to pursue a Pastoral Studies divinity degree, the financial aid office of the university informed him that he was no longer eligible for the grant because it could not be used for divinity, theology, or religious instruction. In other words, religious

studies were being treated differently than other areas of study.

SCHOOL FACULTY AND OTHER STATE EMPLOYEES

- *Barrow v. Greenville ISD,* 332 F.3d 844 (5th Cir. 2003).

  Karen Jo Barrow was denied an assistant principal position because she refused to remove her children from private, Christian school. A lawsuit was filed to protect her rights to select a religious education for her children without suffering repercussions for it at work in the public schools. Though the district court refused to uphold Barrow's parental rights to send her children to Christian school, the Fifth Circuit did and warded off this egregious religious discrimination on the part of the school district.

- *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3d Cir. 1999).

  Two Muslim police officers in Newark were required to shave their beards after the city issued an order requiring all police officers to be clean shaven. The order permitted a medical exemption, but not a religious exemption. The officers had to file a lawsuit to protect their constitutional right to free exercise of their religion.

- *Nichol v. Arin Intermediate Unit 28,* 268 F. Supp. 2d 536 (W.D. Pa. 2003).

  The school district suspended an elementary school instructional assistant Brenda Nichol for wearing a cross necklace, finding her in violation of a district policy based on the Pennsylvania's Garb Statute, which prohibited teachers and other public school employees from wearing religious emblems or insignia.

  A lawsuit was filed to remedy the policy, which was overtly and openly hostile to religion, and to prevent the district from forbidding symbolic speech by employees from a religious viewpoint.

- *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994).

  The Capistrano Unified School District forbade John Peloza, a biology teacher, from discussing religious matters with students the entire time he is on the school campus, even if the discussion occurs outside of class time and is student-initiated. Essentially the district had a history of reprimanding and harassing Peloza because of his worldview. Peloza filed suit to protect his constitutionally-protected free speech and equal protection rights, but the court dismissed Peloza's complaint finding that the school district's interest in avoiding an (unlikely) Establishment Clause violation trumped Peloza's rights.

- *Roberts v. Madigan,* 921 F.2d 1047 (10th Cir. 1990).

  Mr. Roberts' class had a silent reading period daily, and Mr. Roberts had a library of 239 books, from which the students could select reading material. Two of the books dealt with Christianity. Mr. Roberts participated in the reading period, often choosing to read his Bible, and he kept the Bible on his desk during the school day. The school principal censored Mr. Roberts, forbade him from placing his Bible on his desk during the school day and from reading it during the school day, and forbade him from keeping the two Christian books in the library. A lawsuit was filed to end the religious bigotry against Mr. Roberts, but the court upheld the school's action and even awarded the school district court costs.

- Diane Lynne, *Petition Posted to Defend 'God Bless America,'* WorldNetDaily, Jan. 31, 2003.

  Military honor guardsman Patrick Cubbage was fired for saying "God bless you and this family, and God bless the United States of America" to families as he presented a folded flag in honor of a fallen veteran. Though the families did not object to the practice, Cubbage's co-guardsmen complained to their supervisor, and Cubbage was warned not to say the blessing to the families. Later Cubbage gave the blessing to family after a request from the fallen veteran's son, and shortly thereafter Cubbage was fired for giving the blessing.

- Jeremy Gray, *Man Fired Over Lapel Pin Garners Support,* The Birmingham News, June 27, 2004, News.

  The Hoover Chamber of Commerce fired employee Christopher Word because he wore a Ten Commandments lapel pin.

- Bill McAllister, *Gearing Up for Christmas,* Washington Post, Sept. 29, 1995, at N66. The Post Office issued guidelines advising clerks to use words like "Happy Holidays" and to avoid any decorations with a religious theme.

- *From Logan, Kentucky:*

  A public library policy prevented employees from wearing religiously-oriented jewelry, and an employee was fired for wearing a cross. A lawsuit was filed to protect the employee's right to free speech and religious freedom.

- *From Honolulu, Hawaii:*

  Honolulu city employee Kelly Jenkins was prohibited from posting religious literature, like an invitation to his church, in common areas of the employee break

room and employee bulletin boards because of "separation of church and state" concerns. A lawsuit had to be filed to protect Jenkins' rights.

REGULAR CITIZENS

- Jeffrey Spino, *Banned Yarmulke Leads to Judicial Conduct Commission Complaint,* Texas Lawyer, Sept. 30, 1996, at 5.

  Judge Patricia Lykos ordered a Jewish attorney Gil Fried to remove his yarmulke in Texas Court when he was serving as an expert witness.

- *From Vermont:*

  Nancy Zins attempted to purchase specialty plates in Vermont for herself and for her husband with the messages "ROMANS8" and "ROMANS5" on the plates, but her request was denied by the Vermont DMV, which claimed that the messages may be offensive. After first going through the Agency of Transportation, a lawsuit was filed to protect her free speech rights and her ability to select a message for her license plate just as other non-religious citizens are free to do.

- *From Northglenn, Colorado:*

  A coach shared his faith as he coached swimming in the city recreation facility. The city recreations director sent the coach a letter, informing him that he was no longer welcome on the premises of the city recreation facility. A concerned parent inquired to the city to find out why the coach had been banned and was told that the coached used offensive language. Upon further investigation, the parent discovered that the coach's preaching was the problem. A lawsuit was

filed to protect he [sic] man's rights to access the city recreation facility.

IN THE SCHOOLHOUSE

- *Fleming v. Jefferson County Sch. Dist. R-1,* 298 F.3d 918 (10th Cir. 2002).

  Columbine High School hosted a tile-painting project, so students could express themselves following the school's tragedy. Some students expressed themselves with religious symbols, including a victim's sister who incorporated a small yellow cross in her tile design. After the tiles were posted, the school officials eradicated the religious symbols from the tile display, so a lawsuit was filed to prevent the school officials from censoring the religious expression of the students. Unfortunately, the court chose not to uphold the students' expression rights and instead validated the school's censorship.

- *Demmon v. Loudoun County Pub. Sch.,* 279 F. Supp. 2d 689 (E.D. Va. 2003).

  For a school fundraiser, people could purchase bricks and have text and symbols inscribed on the bricks to be used in a sidewalk surrounding the school's flagpole, and some purchasers elected to have a Latin cross inscribed. A parent complained about the crosses, so the school district removed all the crosses. A lawsuit was filed to protect the religious expression from censorship.

- *Selman v. Cobb County Sch. Dist.,* 2004 US Dist. LEXIS 5960 (N.D. Ga. 2004).

  A Georgia School District decided to place a sticker in new science textbooks explaining that evolution was a theory, not a fact, and encouraging students to study

with open minds and critical thinking skills. But a handful of parents complained that the sticker restricted teaching evolution and promoted creationism and filed a lawsuit to prevent its use, under the guise that such a sticker violated the Establishment Clause.

- *Good News Club v. Milford Central School,* 533 U.S. 98 (2001).

  The Milford Central School denied the Good News Club use of the school's facilities after school. A lawsuit was filed to protect the religious group's right to use the school's facilities just like other organizations could, without being discriminated against because it is a religious group. The case had to go all the way to the Supreme Court before the religious group was vindicated because the lower courts both upheld the school's unlawful religious discrimination.

- *Widmar v. Vincent,* 454 U.S. 263 (1981).

  The University of Missouri at Kansas City refused to allow a religious student group access to university facilities as other student groups were permitted to do. The students were forced to file a lawsuit in order to protect their rights to equal access. They simply desired for their religious organization to be afforded the same rights as other student organization [sic].

- *Wigg v. Sioux Falls Sch. Dist.,* 274 F. Supp. 2d 1084 (D.S.D. 2003)

  A school district refused to allow a teacher to participate in a Good News Club meeting at the school after school hours, so the teacher filed suit to protect her rights to assemble with the religious group. The court only partially protected her rights, ruling that she could attend Good News Club meetings, but arbitrarily determined that she only had the protected right

to participate in meetings at schools other than where she taught.

- *Bd. of Educ. v. Mergens,* 496 U.S. 226 (1990).

  The school board refused to allow students to form an extra-curricular Christian club, claiming such a club would violate the Establishment Clause, despite the fact that various other clubs met at the school. A lawsuit was filed to protect a Christian group from being unlawfully discriminated against by a school board.

- *Ceniceros v. Bd. of Trs. of the San Diego Unified Sch. Dist,* 106 F.3d 878 (9th Cir. 1997).

  The school district refused a religious club the opportunity to meet during non-instructional lunchtime, though other groups could. A lawsuit was filed on behalf of the students to prevent the district's unlawful discrimination and to uphold the students' rights under the Equal Access Act. The case went to the Ninth Circuit before the students were finally afforded their constitutional protection.

- *Edwards v. Aguillard,* 482 U.S. 578 (1987).

  A suit was filed to challenge Louisiana's Creationism Act. The Creationism Act provided that if evolution is taught in public schools, creation science must also be taught. And if creation science is taught, then evolution must be taught as well. The suit sought to strike down the act under the guise that it violated the Establishment Clause, and the Supreme Court obliged, striking down the Creationism Act.

- *Bauchman v. West High Sch.,* 132 F.3d 542 (10th Cir. 1997).

  A school choir's repertoire included Christian music and occasionally sang at a church, and a Jewish choir student's family filed a lawsuit, essentially asking the

court to censor the choir from singing any religious music. The case reached the Tenth Circuit before the unlawful religious censorship threat was abated.

- *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995).

  The University of Virginia denied a student journal funding from the school's student activity fund because of the journal's religious viewpoint. The student filed a lawsuit to challenge the guidelines for disbursement of student activity funding because the guidelines were used to discriminate religious viewpoints. The student filed a lawsuit and had to go all the way to the Supreme Court just to have their constitutionally-guaranteed rights upheld.

- *Chandler v. James,* 985 F. Supp. 1068 (D. Ala. 1997).

  Plaintiffs ("civil liberties activists") filed a lawsuit and succeeded in permanently enjoining school board and public officials from accommodating religious activity in schools. The court determined that the school officials' behavior had violated the Establishment Clause because they permitted prayer at school functions, excused students from school for baccalaureate services, and permitted religious study with non-school persons during school hours.

- *Child Evangelism Fellowship v. Montgomery County Pub. Schs.,* 2004 U.S. App. LEXIS 13487 (4th Cir. 2004).

  The Montgomery County Schools refused to allow the Child Evangelism Fellowship (CEF) to participate in the district's take-home flyer forum to distribute flyers about the Good News Club, citing fears about the separation of church and state. A lawsuit was filed to protect the rights of CEF to participate in the flier program just as other organizations were permitted to

do and to force the school district to cease the religious discrimination.

- *Child Evangelism Fellowship of New Jersey v. Stafford Township,* 233 F. Supp. 2d 647 D.N.J. 2002).

  A religious organization was denied permission to post fliers, pass fliers out, staff tables at back-to-school-night or allow students to pass materials to other students about a religious club forming in schools. A lawsuit was filed to protect the right of a religiously-affiliated organization to utilize the same forums that were afforded to other groups and to prevent the school board from discriminating based on a religious viewpoint.

- *Daugherty v. Vanguard Charter Sch. Acad.,* 116 F. Supp. 2d 897 (W.D. Mich. 2000).

  Parents of children attending the Vanguard Charter School Academy claimed that the school violated the Establishment Clause because a mom's prayer group met in the parent room, teachers and staff prayed (on their own accord) on school property, religious materials were distributed in student's folders (a content neutral forum), and the school taught morality. These parents filed a lawsuit to prevent the school from permitting the religious activity at the school.

- *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

  A student and her father filed a lawsuit because the school permitted employees to be involved with student prayer after basketball games, permitted the choir to use a Christian song as its "theme song" and permitted the distribution of Gideon Bibles to fifth grade classes. The court upheld the right of the choir to sing the religious song but struck down the employees'

involvement with prayer, determining that such an exercise violated the Establishment Clause.

- *Mitchell v. Helms,* 530 U.S. 793 (2000).

  Under the Education Consolidation and Improvement Act of 1981, government aid for materials and equipment was provided to public as well as private schools. A lawsuit was filed by parties claiming the law violated the Establishment Clause simply because private schools, including religious schools, received a benefit from the act, which the parties claimed served as an establishment of religion.

- *Peck v. Upshur County Bd. of Educ.,* 155 F.3d 274 (4th Cir. 1998).

  A school board policy permitted religious groups to provide religious materials and Bibles to students on one designated day each school year, but a lawsuit was filed to strike down the policy.

- *Powell v. Bunn,* 185 Ore. App. 334 (Or. Ct. App. 2002)

  An Oregon school district allowed the Boy Scouts to present information on membership to students, but a parent filed suit, challenging the policy on the grounds that it violated the Establishment Clause.

- *Rusk v. Crestview Local Schs.,* 220 F. Supp. 2d 854 (N.D. Ohio 2002).

  School permitted non-profits, including religious non-profits, to submit flyers to the school for distribution to the students' mailboxes, and a parent filed a lawsuit, objecting to the religious groups being able to submit flyers, even though the flyers did not advocate the religion and were not proselytizing. The court halfheartedly upheld the religious groups' rights to utilize the mailbox distribution, but the court only permitted the groups to distribute certain messages

and censored information relating to a religious or sectarian event.

- *Skoros v. City of New York,* 2004 U.S. Dist. LEXIS 2234 (E.D.N.Y. 2004).

  A Catholic parent objected to policy of excluding a Creche from New York City Schools' holiday displays while permitting Menorahs, the Star and Crescent and Christmas Trees. A lawsuit was filed to remedy the exclusion of the Creche. The court determined that it was appropriate to exclude the Creche as it was still a religious symbol while the others had become secularized and that a child would not perceive an endorsement of the Judaism or Islam or disapproval of Christianity.

- *Washegesic v. Bloomingdale Public Schs.,* 33 F.3d 679 (6th Cir. 1994).

  A portrait of Jesus Christ hung in a hallway of a school, and a former student filed suit against the school, asserting that the portrait was an Establishment Clause violation, and the court agreed and decided that the picture must be removed.

- Lisa Falkenberg, *Policy Involving Evolution Prompts Federal Inquiry,* Associated Press, Jan. 29, 2003, BC cycle.

  The story details how Texas Tech professor Michael Dini discriminated against students on the basis of their religion, and the university stood behind the professor saying the professor's policies were not in conflict with those of Texas Tech.

- Ryan McCarthy, *School Rallies to Retain Sigh* [sic]*; The ACLU Says the Message 'God Bless America' Divides Kids by Religion and is Unconstitutional,* The Sacramento Bee, Oct. 6, 2001.

In the wake of Sept. 11, 2001, Breen Elementary School in Rocklin, California had a sign posted that said 'God Bless America,' and the ACLU intervened in an attempt to have the sign removed, calling it a clear violation of the U.S. and California constitutions and divisive.

- Barbara Vobejda, *School Officials' Weigh Sachs' Ruling on Religious Gatherings,* Washington Post, Dec. 8, 1984, B3.

  Maryland Attorney General Stephen H. Sachs ruled that Catonsville High School students could continue their informal religious activity of gathering to read the Bible during their Thursday lunch hours. School administrators were worried about the ruling because they feared it would create problems in a "sensitive area." Additionally, in Prince George's County school administrators renamed Christmas trees and Christmas pageant, holiday trees and holiday pageant respectively.

- *From Oswego County, New York:*

  The Mexico Academy High School decided to start removing bricks that had been purchased and inscribed as part of a school fundraiser if the brick contained a Christian message. A lawsuit had to be filed to protect the free speech and equal protection rights of citizens who had purchased the bricks and to prevent the religious censorship.

- *From Crosby-Ironton High School in Crosby, Minnesota:*

  The Crosby-Ironton High School censored the Lunch Bunch, a Christian group, from using flier to describe their group and to promote the See You at the Pole event. A lawsuit was filed to protect the students' rights, the same rights afforded to other student organizations.

- *From Los Angeles Unified School District:*

  The Los Angeles Unified School District tried to force a "Good News Club" to pay fees to utilize school facilities, but did not require fees from the Boy Scouts or the YMCA. A law suit was filed, seeking to grant religious groups equal access to school facilities.

- *From Montgomery County Public Schools, Maryland:*

  A school policy prevented students from receiving credit for their religious community service to fulfill the 60-hour community service graduation requirement. Students who worked at a Vacation Bible School on an Indian Reservation were not permitted to count that time toward their hourly requirement. Attorneys intervened and the students were permitted to count the hours, but, unfortunately, the policy remains and continues to discriminate against students who participate in religiously-based community service.

- *From Dillon, Montana:*

  Motivational speaker Jaroy Carpenter was prevented from speaking at an assembly in the Dillon Middle School because he was an evangelical Christian and affiliated with the Dawson McAllister Association. He was prevented from speaking despite the fact that he had previously spoken in over 200 secular schools, and he agreed to omit discussions of his religious faith and references to a youth rally being held nearby. A lawsuit was filed to protect Carpenter's rights.

- *From Carl Sandburg Community College, Indiana:*

  Cosmetology teacher Louise Piggee was reprimanded severely and denied a contract renewal after she shared some religious literature outside of the classroom with

a student with whom she had developed a relationship. A lawsuit was filed.

- *From Reno, Nevada:*

  School officials sought to prevent a Bible club from disturbing candy canes with the message "Jesus Loves You" attached to it.

- *From Northville High School in Michigan:*

  A Bible club was told it would have to meet before or after school and not during seminar period as other groups are permitted to do because of the religious nature of the group. Bible club members filed suit to protect their right to meet without being discriminated against because their groups was [sic] religious.

- *From Panama City, Florida:*

  A school principal changed the name of the Bible Club from Fellowship of Christian Students to Fellowship of Concerned Students without conferring with student members.

- *From Beaumont Independent School District, Texas:*

  The superintendent started a "clergy-in-schools" program, which allowed clergy to mentor students, but the Americans United for Separation of Church and State filed suit seeking to strike down the program.

- *From South Tama Community School District, Iowa:*

  The community center denied the Fellowship of Christian Athletes (FCA) access to facilities, so an FCA member complained and a demand letter was sent to the school district, informing them of the situation. Only then, did the school district back down and change their policy to stop discriminating against religiously affiliated groups.

- John M. Hartenstein, *A Christmas Issue: Christmas Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion*, 80 Calif. L. Rev. 981 (1992).

RELIGIOUS HOLIDAY OBSERVATION

- *Metzl v. Leininger,* 57 F.3d 618 (7th Cir. 1995).

  A teacher filed suit in objection to teachers being permitted to take Good Friday off with pay, claiming the practice violated the Establishment Clause.

- *Bridenbaugh v. O'Bannon,* 185 F.3d 796 (7th Cir. 1999).

  A citizen filed suit to challenge the Indiana policy of giving state employees Good Friday as a day off with pay, claiming that the policy established religion.

- *Freedom From Religion Foundation v. Thompson,* 920 F. Supp. 969 (W.D. Wis. 1996) (mem.).

  Anti-religion group filed suit to challenge a Wisconsin statute that recognized Good Friday as a holiday, claiming that designating Good Friday as a holiday violates the Establishment Clause. The court agreed, finding that the Establishment Clause was violated.

- *From Garden City Long Island, New York:*

  Teachers in Garden City Long Island wanted to use personal days to observe religious holidays, which is one of listed permissible uses for a personal day, but when some Catholic teachers requested to use a personal day for Holy Thursday and some Jewish teachers wanted to use a personal day during Passover, they were denied and were forced to go to arbitration to prevent the religious discrimination.

EQUAL ACCESS, CHURCH AND RELIGIOUS GROUP DISCRIMINATION

- *Bronx Household of Faith v. Bd. of Educ.,* 331 F.3d 342 (2003).

  The Bronx Household of Faith filed suit to prevent the New York public schools from discriminating against churches. The public schools refused to allow churches to use school facilities, but permitted other community groups to have access. The church brought suit so it could be treated just like any other community group wanting to use the facility.

- *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah,* 508 U.S. 520 (1993).

  The Church of the Lukumi Babalu Aye sought to set up a church in Florida; the church practices Santeria, a religion which incorporates animal sacrifice into its religious practices. Upon hearing of the church's plan to develop a church in the city, the city counsel held an emergency meeting and passed ordinances which would prevent the church from practicing the animal sacrifice, an essential part of the church's free exercise. A lawsuit was filed to protect the church's right to free exercise.

- *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

  A New York school board denied a church after-hours access to a school to exhibit a film series about Christian family values because of a policy prohibiting use by any group for religious purposes. A lawsuit was filed to protect the church's right to have access to the school premises. The church should not be treated like a second-class citizen because it is religious.

- *Liberty Christian Center v. Bd. of Educ.*, 8 F. Supp. 2d 176 (N.D.N.Y 1998).

  A suit was filed after the Board of Education of Watertown, New York denied the Liberty Christian Center (LCC) access to the Watertown High School Cafeteria during non-school hours. A lawsuit was filed to prevent the Board from discriminating against a religious group and denying its rights to equal access.

- *Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001).

  Pastor John Amandola's church Roman Chapter Ten Ministries, Inc. had obtained a permit to use the Babylon's Town Hall Annex to hold worship services, but when an angry resident called the city to complain about the facilities being used for church services, the town revoked the permit. The church filed suit to protect their right to access the community facilities and to end the religious bigotry.

- *Church on the Rock v. City of Albuquerque,* 84 F.3d. 1273 (10th Cir. 1996).

  City prevented senior citizens groups from presenting a Jesus video, giving Bibles away or having sectarian instruction and religious worship at the senior center. So, a lawsuit was filed to challenge the city's policy, which was unconstitutionally restricting religious expression.

- *Ehlers-Renzi v. Connelly Sch. of the Holy Child,* 224 F.3d 283 (4h Cir. 2000).

  An ordinance in Montgomery County, Maryland accommodated churches by exempting them from acquiring a special permit before constructing a school on church property, but a lawsuit was filed in an attempt to strike down the law.

- *Ford v. Manuel,* 629 F. Supp. 771 (N.D. Ohio 1985).

  The Findlay Board of Education permitted the Findlay Weekday Religious Education Council to operate before and after school hours in the public schools in accordance with "Community Use of School Facilities," but parent-taxpayers complained about the program because of concerns regarding the Establishment Clause and filed a lawsuit in hopes of striking down the program.

- *Moore v. City of Van,* 238 F. Supp. 2d 837 (E.D. Tex. 2003) (mem.).

  The City of Van had an unwritten policy of refusing to permit a group to access the Van Community Center if the use was for a religious purpose, so citizens seeking to use the center for religious purposes filed suit to protect their rights and to prevent the city from having policies that discriminate against religious groups.

- *From New York City:*

  A New York City pastor wanted to use the Woodside Community Center, located in a public housing development, to host a Bible study for New Yorkers following the attacks on September 11, 2001. The pastor was denied his request because religious services (unless connected to a family oriented event like a wedding) were prohibited. A lawsuit was filed to prevent the community center from treating religious groups differently than other groups.

- *From the Church of Christ in Hollywood, California:*

  Former church member Lady Cage-Barile began to intimidate and harass members of the church and interrupt and disrupt Bible studies, so the church informed her she was no longer welcome on church property. When the church sought an order barring

Cage-Barile, the court denied it, and the church was forced to go to the California Court of Appeals to enforce its right to exclude trespassers from church premises.

- *From Mitchell County, Texas:*

  The public library in Mitchell County, Texas tried to deny Rev. Seneca Lee access to a room to hold a meeting about political and social issues from a Christian Perspective because of a library policy that prevented religious groups from using the meeting room. After a lawsuit was filed, the library changed their policy of discriminating against religious groups.

- *From Plano, Texas:*

  The city of Plano attempted to prevent the Willow Creek Fellowship from opening because of the slant of the roof, despite the fact that no ordinance existed relating to the angle of the room and despite the fact that a school just down the street from the church had an identical angle. Only after threat of a lawsuit did the city relent and permit the church to open.

- *From Cassadaga, Florida:*

  A church was refused zoning approval for a church after they had purchased land outside of Cassadaga, which was a violation of Religious Land Use and Institutionalized Persons Act (RLUIPA). A lawsuit was filed in Federal Court, and the county settled, ending the lawsuit and permitting the church to locate in Cassadaga.

- *From the Dallas Independent School District in Texas:*

  Reunion Church had leased an empty high school on Sunday morning for services, but the school district evicted the church in the middle of the lease, citing the "separation of church and state." A lawsuit was

filed to protect the church's equal access, and the school district changed their policy to grant religious groups the same treatment as non-religious organizations.

- *From the Cave Creek School District, Arizona:*

  The Cave Creek public school district passed a policy allowing non-profit community groups to meet in public schools without charge, but the policy excluded churches. A church was charged $1,200 under the policy to access the school. An attorney got involved to explain the constitutional issues associated with the policy and to request records under the Freedom of Information Act to determine how much the school had charged other groups during the previous three years. As a result of the intervention, the school district decided to revise the discriminatory policy and also decided to reimburse the church for their moneys.

- *From Lebanon, Indiana:*

  A minister and a church member from Grace Baptist Church were prohibited form distributing religious literature in a public park, though the minister had distributed materials for years in the park. A lawsuit was filed to protect the minister's rights.

- *From Ontario, California:*

  The Church of the Light bought some land in Ontario after determining that the property was zoned so that it could contain religious assembly. However, the city passed an ordinance requiring new churches to obtain a permit before building, and five days after the ordinance was passed, Ontario's Development Advisory Board denied the church's permit applications, claiming the denial was because if [sic] allegations that the

church was a cult. A lawsuit was filed to protect the church's rights to build their church.

- *From Balch Springs, Texas (Barton v. City of Balch Springs):*

  Senior citizens were told to stop their 20-year-old practices of praying before their meals, having an inspirational religious message, and singing gospel songs in their Senior Citizens Center because of a new city policy banning religion in public buildings. A lawsuit was filed to defend the seniors' rights.

- *From Dunedin Public Library in Tampa, Florida:*

  The Liberty Counsel was denied access to the library's community meeting room for a meeting relating to America's Christian History and the influence of the Ten Commandments, a historical presentation from a religious perspective, which was open religious viewpoint discrimination.

- *From San Fernando Valley, California:*

  The Child Evangelism Fellowship (CEF) applied to the Los Angeles Unified School District to use the Chase Street Elementary School in Panorama City to host a Good News Club. The school policy permitted use by civic and community groups, but prevented use by "sectarian of denominational religious exercises or activities." So, the CEF applied through the Real Estate branch and was willing to pay application and rental fees, which is not required of all other groups, but CEF was still denied. A lawsuit was filed to gain equal access for the religious group and to prevent the school district's religious discrimination.

HOLIDAY DISPLAYS

- *ACLU of NJ v. Township of Wall,* 246 F.3d 258 (3d Cir. 2001).

  The ACLU, along with some citizens, filed a lawsuit to challenge a holiday display consisting of a crèche with traditional figures, a lighted tree, urns, candy cane banners, a menorah, and signs commenting on celebrating diversity and freedom as well as wishing passer-bys Merry Christmas and Happy Hanukkah.

- *Amancio v. Town of Somerset,* 28 F. Supp. 2d 677 (D. Mass. 1998).

  Somerset resident filed a lawsuit challenging Somerset's Christmas display, which includes a Nativity crèche, holiday lights, a wreath, a Christmas tree and a plastic Santa Claus. The display had been a Somerset tradition for 60 years.

- *Lynch v. Donnelly,* 465 U.S. 668 (1984).

  Pawtucket, Rhode Island has an annual Christmas display in the city's shopping district, which is owned by a nonprofit, and it includes a Santa house, Christmas tree, a "Seasons Greetings" banner, and a crèche, which had been a staple of the display for over 40 years. A lawsuit challenged the display and specifically the inclusion of the crèche.

- *ACLU v. City of Birmingham,* 791 F.2d 1561 (6th Cir. 1986).

  The ACLU filed suit to expel a crèche from the annual holiday display at city hall, claiming it violated the Establishment Clause.

- *ACLU of New Jersey v. Schundler,* 168 F.3d 92 (3d Cir. 1999).

  The ACLU filed suit to challenge a holiday display, which included a crèche and a menorah, claiming the display violated the Establishment Clause.

- *ACLU of Kentucky v. Wilkinson,* 701 F. Supp. 1296 (E.D. Ky. 1988).

  The ACLU filed suit to challenge a nativity scene on the Kentucky Capitol, seeking an injunction preventing the continued use of the nativity scene, claiming the nativity scene was an endorsement of religion.

- *ACLU v. City of Florissant,* 186 F.3d 1095 (8th Cir. 1999).

  The ACLU filed suit to challenge a holiday display at the city Civic Center in Florissant, Missouri on behalf of a resident who was offended by the inclusion of the crèche in the holiday display.

- *ACLU of New Jersey v. Schundler,* 104 F.3d 1435 (3d Cir. 1997).

  The ACLU along with some citizens filed suit challenging a holiday display containing a crèche and a menorah on city hall property.

- *Americans United for Separation of Church and State v. City of Grand Rapids,* 1992 U.S. App. LEXIS 7513 (6th Cir. 1992).

  Americans United filed suit to prevent a menorah from being placed on Calder Plaza in Grand Rapids during the Chanukah celebration, claiming the placement of the menorah established religion. The court struck down the display, determining that the city appeared to be endorsing religion because of the display.

- *Calvary Chapel Church, Inc. v. Broward County,* 299 F. Supp. 2d 1295 (S.D. Fla. 2003).

  Broward County, Florida hosts the Holiday Fantasy of Lights in a public park as a city fundraiser. A church wanted to contribute to the event and have a display that included the words, "Jesus is the Reason for the Season," but the city refused to allow it. The church filed a lawsuit in order to protect their constitutional rights to participate in the city event without having their message being censored because it was religious.

- *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995).

  The board responsible for regulating the Ohio State Capitol Square refused a permit to a group wanting to display a cross during the 1993 Christmas season, so a lawsuit was filed.

- *Comty. for Creative Non-Violence v. Lujan,* 908 F.2d 992 (D.C. Cir. 1990).

  The Park Service has hosted a "Christmas Pageant of Peace" on White House grounds since 1954 and includes the pageant included the National Christmas Tree, a Nativity Scene, and live reindeer. The Park Service declined to include a sculpture from the Community for Creative Non-Violence, and the Community filed suit.

- *County of Allegheny v. ACLU,* 492 U.S. 573 (1989).

  The ACLU challenged a holiday display, and the Supreme Court held that a menorah in front of the City-County Building for a seasonal display did not violate the Establishment Clause, though a crèche in the county courthouse did.

- *Doe v. Small,* 934 F.2d 743 (7th Cir. 1991).

  Citizen filed a lawsuit to challenge a city annual yuletide display, which included 16 large paintings showcasing events in the life of Jesus Christ in hopes of eradicating the religious expression from the public square and striking down the yuletide display. The court struck down the long-standing tradition of including the 16 pictures of Jesus, finding that such a display endorsed religion and as such violated the Establishment Clause.

- *Doe v. City of Westland,* 1987 U.S. Dist. LEXIS 15321 (E.D. Mich. 1987).

  Doe, supported by the ACLU, brought a lawsuit to challenge a Christmas display in the Westland central city complex because it included a nativity scene.

- *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir. 1989).

  Lawsuit challenged a menorah display during December, and the court struck down the display of the menorah on the grounds that such religious expression offended the Establishment Clause.

- *King v. Village of Waunakee,* 517 N.W.2d 671 (Wis. 1994).

  Citizens filed a lawsuit challenging a crèche display during the Christmas season, seeking to eradicate the religious symbol from public square.

- *Mather v. Village of Mundelein,* 864 F.2d 1291 (7th Cir. 1989).

  Plaintiff Rachel Mather challenged the holiday display in front of Village Hall in Mundelein, alleging that the display included a crèche and gave her a sense of inferiority because she's Jewish.

- *Soc'y of Separationists, Inc. v. Clements,* 677 F. Supp. 509 (W.D. Tex. 1988).

  The Society of Separationists filed a lawsuit challenging the "Christmas Carol Program," which is an annual event in the Texas Capitol when a Christmas tree is presented to Texas, politicians make speeches, the Texas Public Employees Association presents money to charity, Santa visits, singers perform Handel's Messiah and two religious carols are performed. The Separationists asserted that the program violates the Establishment Clause and sought a preliminary injunction to prevent the program from occurring.

- Terry Mattingly, *On Religion: Things Got Rough on Church-State Front This Holiday Season,* Naples Daily News, Jan. 17, 2004.

  The article chronicles the Christmas Season and the drama relating to public displays of celebration, including a story on firefighters in Glenview, Illinois who removed Christmas lights after neighbors complained of being offended. In addition, a pastor in Chandler, Ariz. complained that the public library display excluded Christmas and only included Hanukkah and Kwanzaa. The library took down the entire display, rather than augment the display with some information about Christmas. And in Tallahassee, Florida, a controversy erupted when a Jewish Chabad offered to help purchase a menorah for the courthouse yard and the ACLU threatened suit.

CITY SEALS, MOTTO, SCULPTURES, AND THE PLEDGE

- *ACLU v. Capitol Square Review and Advisory Bd.,* 243 F.3d 289 (6th Cir. 2001).

  The ACLU filed a lawsuit challenging Ohio's motto, "With God, All Things Are Possible."

- *Gaylor v. U.S.*, 74 F.3d 214 (10th Cir. 1996).

  The Freedom from Religion Foundation along with some citizens challenged the use of the national motto on the U.S. currency in federal court.

- *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998).

  The ACLU challenged the placement of a cross on Stow's city seal, claiming that the use of such a symbol served as an establishment of religion. Unfortunately, the ACLU prevailed in the lawsuit because the court found that a reasonable observer would perceive the cross on the seal as an establishment of religion with the effect of advancing or promoting Christianity, and the city was forced to remove the cross.

- *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991).

  The Society of Separationists and some other citizen plaintiffs challenged the use of religious symbols on city seals in Rolling Meadows and Zion, Ill. The Rolling Meadows seal contained a Latin cross and was adopted in 1960 and the Zion's seal contained a Latin cross, a dove carrying a branch and was adopted in 1902. The court struck permanently enjoined the cities from using the long-standing seals, considering the use of the religious symbols to violate the Establishment Clause. The decision effectively eradicated both cities' religious history and influence from the city seals.

- *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

  A small group of citizens filed suit and claimed that the 130-year-old seal of the Superior Court of Richmond County violated the Establishment Clause and was unconstitutional because the image included a portrayal of the Ten Commandments tablets.

- *Robinson v. City of Edmond*, 68 F.3d 1226 (10th 1995).

  Plaintiffs filed suit to challenge the use of a Latin or Christian cross on the Edmond's city seal, which was adopted in 1965 through a competition through the City Counsel and the local newspapers. The cross reflected the historical importance of the Catholic Church in the development of the southwest, but the court held that the seal established religion and struck down the use of the cross, eradicating the historical significance of religion from the seal.

- *Lambeth v. Bd of Comm'rs*, 2004 U.S. Dist. LEXIS 11195 (M.D.N.C. 2004).

  A pair of attorneys filed suit claiming that a display of the national motto on the Davidson County Governmental Center violates the Establishment Clause.

- *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996).

  The City of San Jose installed and maintained a sculpture ("Plumed Serpent" – of Aztec mythology) to commemorate the Mexican and Spanish contributions to the city's culture. When people began to bring flowers and burn incense at the sculpture, citizens filed suit claiming the sculpture violated the Establishment Clause, but the court upheld that sculpture.

- *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989).

  A citizen sued the city claiming an illuminated Latin cross on a city water tower violated the Establishment Clause, and the court determined that the cross violated the Establishment Clause and enjoined the city from keeping the cross on the water tower, expunging the religious expression from the public square.

- *Murray v. City of Austin,* 947 F.2d 147 (5th Cir. 1991).

  The Society of Separationists brought suit challenging city insignia of Austin because it included a cross, but the court upheld the city's insignia against the censorship attempt.

- *Myers v. Loudoun County Sch. Bd.,* 251 F. Supp. 2d 1262 (E.D. Va. 2003) (mem.).

  A lawsuit was filed challenging the constitutionality of two Virginia statutes, one that required students in public schools to say the pledge of allegiance and the other required the national motto to be posted at Virginia schools.

Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2002).

Atheist Michael Newdow filed suit to remove the words "under God" from the Pledge of Allegiance. Newdow's daughter attends public elementary school where students recite the Pledge as part of the morning activities. Newdow filed suit claiming that his daughter is injured because she is compelled to witness her teacher lead her classmates in a ritual where they are proclaiming that there is a God and that our nation is under God.

- *Paulson v. City of San Diego,* 294 F.3d 1124 (9th Cir. 2002).

  A citizen challenged the constitutionality of a cross erected in Mt. Soledad Natural Park, which is owned by San Diego, and the court found that the city violated the California Constitution by keeping the cross and forbade the city from maintaining the cross.

- Hugo Martin, *Facing ACLU Complaint, City to Drop Seal's Cross,* L.A. Times, April 29, 2004, at B1.

  The ACLU threatened a lawsuit against the city of Redlands if the city did not remove a cross from the city's seal. The city removed the cross rather fight a legal battle against the ACLU, despite many protests from citizens wanting the seal to retain the cross.

- Sue Fox, *Facing Suit, County to Remove Seal's Cross,* L.A. Times, June 2, 2004, at B1.

  The ACLU threatened a lawsuit if the Los Angeles County did not remove a cross from the county's seal, and the county succumbed to the ACLU's pressure and decided to remove the cross. The cross had adorned the seal since 1957 along with a cow, tuna fish, Spanish galleon, the Hollywood Bowl, and the Goddess Pomono. The region was sealed by Catholic missionaries and the cross memorialized that historical fact.

- *From Springfield, Missouri*

  The ACLU filed a lawsuit challenging the use of an ichthus (i.e. a Christian fish symbol) on the city of Republic's seal, and a federal judge ordered the city to remove the symbol.

- *ACLU Finds Gold at the Foot of the Cross,* Chattanooga Times Free Press, June 24, 2004, B7 (editorial).

  The editorial outlines the amount of money the ACLU receives in attorneys' fees from challenging Ten Commandments displays, religious symbols on city seals, and the Pledge of Allegiance. When a city loses one of these battles in court, the city must pay the ACLU, into the tens of thousands to the hundreds of thousands of dollars.

- John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance,* 38 Harv. C.R.-C.L. L. Rev. 563 (2003).

TEN COMMANDMENTS

- *Harvey v. Cobb County,* 811 F. Supp. 669 (ND. Ga. 1993), aff'd per curiam, 15 F. 3d 1097 (11th Cir. 1994).

  Plaintiffs filed suit challenging a framed panel of Ten Commandments and the Great Commandment displayed at the county courthouse. The court concluded that the displays were unconstitutional, but the court allowed a stay so that the county could incorporate non-religious, historical items, which according to the court would transform the display to fit within constitutional guidelines.

- *Ind. Civ. Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir. 2001).

  The Fraternal Order of the Eagles donated Ten Commandments plaques to communities across the U.S. in the 1950s, including one to the Indiana Statehouse in Indianapolis, which was destroyed in 1991 by a vandal. An Indiana State Representative planned a replacement monument consisting of the Ten Commandments, the Bill of Rights, and the Preamble to the Indiana Constitution, but a lawsuit was filed challenging the proposed monument on the grounds that it would establish religion. The court did indeed find that such a monument would violate the Establishment Clause as citizens may not understand the connection between the display and our nation's legal history and think the monument was erected for religious purposes.

- *Kimbley v. Lawrence County, Ind.,* 119 F. Supp. 2d 856 (S.D. Ind. 2000).

  Civil liberties groups filed suit in response to a proposed Ten Commandments display, which had been authorized by state law, seeking to prevent the display.

- *Mercier v. City of La Crosse,* 276 F. Supp. 2d 961 (W.D. Wis. 2003).

  In the 1960s, the Fraternal Order of the Eagles (FOE) donated a Ten Commandments display to the city, and in the 1980s, citizens complained about the display. The city sold the portion of land on which the monument was located to FOE and placed signs stating that FOE owned the property and that the city did not endorse religion. This did not satisfy the Freedom from Religion Foundation and some citizens, and the organization filed a lawsuit still seeking to strike down the display. The court held that despite the fact that the city had sold the land to a private organization, the Ten Commandments monument still implied that the city was endorsing religion and ordered FOE's land be returned to the city and the monument removed.

- *ACLU of Kentucky v. Grayson County,* 2002 WL 1558688 (W.D. Ky. 2002).

  A Grayson County courthouse display called "Foundations of American Law and Government Display" is composed of a variety of documents including the Ten Commandments, the Magna Carta, the Mayflower Compact, The Star Spangled Banner, among others. But the ACLU filed a lawsuit to challenge the display because the Ten Commandments were included. The court censored the use of the Ten Commandments in the display.

- *ACLU Neb. Found v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), vacated, reh'g granted 2004 U.S. App. LEXIS 6636.

  The ACLU and a member who resided in Plattsmouth, Nebraska filed suit, complaining that the city's Ten Commandment display violated the Establishment Clause. The display was donated to the city in 1965 by the Fraternal Order of the Eagles, which erected many such displays in the 1950s and 1960s in an effort to combat juvenile delinquency. The court struck the display down, determining that it promoted religion.

- *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).

  In 2000, Kentucky Governor Paul E. Patton signed a resolution that permitted public school teachers to display the Ten Commandments in their classroom also authorized the relocation of the Ten Commandments monument from the Fraternal Order of the Eagles on Capitol grounds as part of a display that would showcase Kentucky's Biblical historical heritage. Citizens protested the proposed display and filed a lawsuit to challenge the resolution, and the court determined that the proposal was unconstitutional.

- *Baker v. Adam County/Ohio Valley Sch. Bd.*, 2004 U.S. App. LEXIS 481 (6th Cir. 2004) (not recommended for full-text publication).

  A school board erected Ten Commandment monuments that a county ministerial association paid for, and a suit was filed, challenging the constitutionality of the monuments. The school board added other historical documents relating to the development of American law and government to the displays, but the lawsuit continued anyway. The court ordered that the monuments be removed.

- *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2001).

  Elkhart's Municipal Building had a monument of the Ten Commandments, and residents filed suit in objection to the display, claiming it violated the Establishment Clause. The Seventh Circuit struck down the display.

- *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003).

  The ACLU filed suit to challenge Ten Commandments displays from three Kentucky county courthouses, seeking to have the displays removed, and the Sixth Circuit ordered the displays be eradicated from the courthouse.

- *ACLU of Ohio v. Ashbrook*, 211 F. Supp. 2d 873 (N.D. Ohio 2002).

  The ACLU brought a lawsuit seeking the removal of the Ten Commandments from a state courtroom display, which features the Ten Commandments along with the Bill of Rights, and the court struck down the display.

- *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002).

  The ACLU filed suit challenging the Ten Commandments displays in county courthouses.

- *ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002).

  The ACLU sued Rutherford County to challenge the Ten Commandments display in the county courthouse lobby.

- *Chambers v. City of Frederick*, 292 F. Supp. 2d 766 (N.D. Md. 2003) (mem.).

Chambers, a Frederick resident, objected to the Ten Commandment display in the city park that the Fraternal Order of the Eagles (FOE) had donated in 1958. In response, the city sold that portion of the park to the FOE, and the FOE covenanted to care for the area. Chambers still not satisfied, filed a lawsuit.

- *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999).

  A school's baseball booster club raised funds by selling ads on the baseball field fence for $400. Mr. DiLoreto, CEO of Yale Engineering, bought an ad, which he sought to use to display the Ten Commandments. But the sign was rejected and Mr. DiLoreto's money was returned. A lawsuit was filed to protect Mr. DiLoreto from viewpoint discrimination.

- *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000).

  A Harlan student's parents filed suit to challenge the public schools' practice posting the Ten Commandments in classrooms. In response to the lawsuit, the school district added other historical documents to the displays, but the lawsuit continued.

- *Freethought Soc'y v. Chester County*, 334 F.3d 247 (3rd Cir. 2003).

  A lawsuit was filed to challenge the Ten Commandments display on the county courthouse facade, but the court allowed the display to remain.

- *Grassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2004).

  Alabama Supreme Court Chief Justice Roy S. Moore installed a Ten Commandments monument in the state's judicial building, and a lawsuit was filed to challenge the display and the monument was forcibly removed.

- *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

  A lawsuit challenged a statute that required the posting of the Ten Commandment in classrooms, with a disclaimer relating to the secular use of the Ten Commandments in Western Civilization.

- *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).

  The Summum Church asked the city of Ogden to replace a Ten Commandments display that the Fratemal Order of the Eagles had donated to the city with a monument to the Summum religion. The church filed a lawsuit.

- *Turner v. Habersham County*, 290 F. Supp. 2d 1362 (2003).

  Citizens challenged the display of the Ten Commandments at the Habersham County Courthouse.

- *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003).

  A Texan challenged the Ten Commandments display on state capitol grounds in Austin, but the court upheld the display.

- *Young v. County of Charleston*, 1999 WL 33530383 (S.C. Com. Pl. 1999).

  A court struck down a city courthouse Ten Commandment display as a violation of the Establishment Clause.

- Nicole Buzzard, *A Youth with a Mission: A Santiago High School Junior seeks to post the Ten Commandments at Corona-Norco Campuses*, The Press Enterprise Co. (Riverside, CA), June 30, 2004, B01.

  High school junior Jason Farr wanted to post Ten Commandments fliers in his high school, Santiago High School, and other schools in his district. After

posting the Ten Commandments fliers, he was threatened with a five-day suspension. Additionally, Farr has been informed that the Bible is not suitable material for the silent reading period, despite the fact that it fulfills page and genre requirements.

- Brad Hern, *Coalition Wants to put Monument on Ballot; Boise City Attorneys will Determine whether Voter Initiative is Valid,* The Idaho Statesman, June 14, 2004, at Local, p. 1.

  Supporters of Ten Commandments displays in Treasure Valley are working to overturn the removal of the Ten Commandments display by the city council.

- Kristen Wyatt, *Counties Continue Religious Postings,* The Associated Press, July 8, 2004, North Georgia, B1.

  Two Georgia counties have added Ten Commandment displays to their courthouses, and legal challenges may likely follow.

- *From Manhattan, Kansas:*

  The ACLU and the Americans United for Separation of Church and State challenged a Ten Commandments monument at the city hall in Manhattan. After the lawsuit was filed, the City Commission decided to settle and remove the display.

- *From Everett, Washington:*

  The Americans United for Separation of Church and State filed suit challenging a Ten Commandments Display donated by the Fraternal Order of Eagles.

- Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Text Violate the Establishment Clause,* 39 S. Tex. L. Rev. 101 (1997).

OTHER

- *Marsh v. Chambers,* 463 U.S. 783 (1983).

  A member of the Nebraska legislature brought suit challenging the longstanding practice of employing a chaplain to pray before the opening of each legislative session, claiming the practice was unconstitutional.

- *Barnes-Wallace v. Boy Scouts of America,* 275 F. Supp. 2d 1259 (S.C. Cal. 2003).

  An agnostic family sued San Diego and the Boy Scouts because the city had leased some public parkland to the Boy Scouts. They claimed the lease violated the Establishment Clause.

- *HEB Ministries v. Texas Higher Educ. Coordinating Bd.,* 114 S.W.3d 617 (Ct. App., Austin 2003).

  Texas passed a law forcing all private postsecondary educational institutions in the state to get accreditation from a state agency. Tyndale Seminary was fined $173,000 by the state for using the word "seminary" and issuing theological degrees without government approval. A suit was filed to prohibit the government attempts to control religious training, but the Texas Court of Appeals in Austin upheld the law.

- *Doe v. Vill. of Crestwood,* 917 F.2d 1476 (7th Cir. 1990).

  A long-standing tradition of the Village of Crestwood's "A Touch of Italy" festival was to include an Italian Mass, but a citizen filed suit challenging the mass tradition.

- *Freedom From Religion Found. v. McCallum,* 324 F.3d 880 (7th Cir. 2003).

  The Freedom from Religion Foundation filed a lawsuit to prevent correctional authorities from funding

Faith Works because the halfway house incorporates Christianity into its program.

- *Freedom From Religion Found. v. Romer,* 921 P.2d 84 (Colo. Ct. App. 1996).

  The Freedom from Religion Foundation sued Denver City Council members and Arapaho County officials after the Pope visited Denver for World Youth Day in 1993. The lawsuit asserted that using a state park for religious services, temporarily closing the park to the public and use of state funds to facilitate the visit violated the First and Fourteenth Amendments.

- *North Carolina Civil Liberties Union Legal Foundation v. Constangy,* 947 F.2d 1145 (4th Cir. 1991).

  A legal organization and some citizens challenged a judge's practice of opening his session with a prayer, seeking to forbid the judge from continuing the practice.

- Bill McAllister, *Postal Service Ends Christ Camp Stamp Series,* Washington Post, Nov. 19, 1994, at F1.

  The Post Office replaced its Madonna and Child stamp in the holiday stamp collection with an angel stamp after using the Madonna and Child for 28 years. The Post Office resumed the stamp after there was a public outcry.

- *From Madison, Wisconsin:*

  The Freedom from Religion Foundation challenged the constitutionality of a faith-based program working to rehabilitate and treat prisoners who have drug and alcohol addictions. The program was highly successful and President Bush even visited it to stress excellence and success of the program. Although the faith-based program was merely an option, and no prisoner had to choose to attend the program, the

Freedom from Religion Foundation challenged the program because of its disdain that the program was an option for prisoners and that state funding was used by the program, claiming a "separation of church and state" violation.

- *Grace Community Church, et al. v. City of McKinney, et al.,*

  Civil Action No. 4:04CV251

A new church starting in McKinney, Texas began meeting on Sundays in the pastor's home with a few couples. The City took drastic action to shut down a church meeting in the home. The City has no problem with people meeting in their homes for football watch parties, birthday parties or even commercial gatherings to sell Tupperware. However, the City prohibits a church meeting in a home unless the home sits on at least two acres.

SUMMARY OF STATE CONSTITUTIONS
RE: *RELIGION* CLAUSES

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Alabama (*Ala. Const.*)	Art. I, sec. 3	Art. I, sec. 3	Art. I, sec. 3	Art. I, sec. 3	Art. XIV, sec. 263
Alaska (*AK Const.*)	Art. 1, sec 4	–	–	–	–
Arizona (*A.R.S. Const.*)	–	–	Art. 2, sec. 12 Art. 9, sec. 10	–	Art. 11, sec. 7
Arkansas (*AK Const.*)	–	Art. II, sec. 24	–	Art. II, sec. 24	–
California (*Ann. Cal. Const.*)	Art. I, sec. 4	Art. I, sec. 4	Art. IX, sec. 8 Art. XVI, sec. 5	–	Art. IX, sec. 8
Colorado (*C.R.S.A. Const.*)	–	Art. II, sec. 4	Art. IX, sec. 7 Art. V, sec. 34	Art. II, sec. 4	Art. IX, sec. 8

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Connecticut (*C.G.S.A. Const.*)	–	Art. VII	–	Art. VII	–
Delaware (*Del.C.Ann. Const.*)	–	Art. I, sec. 1	Art. X, sec. 3	Art. I, sec. 1	–
Florida (*F.S.A. Const.*)	Art. I, sec. 3	–	Art. I, sec. 3	–	–
Georgia (*Ga Const*)	–	–	Art. I, sec. 2	–	–
Hawaii (*HI Const.*)	Art. I, sec. 4	–	Art. X, sec. 1 Art. VII, sec. 4	–	Art. X, sec. 1
Idaho (*ID Const.*)	–	Art. I, sec. 4	Art. IX, sec. 5	Art. I, sec. 4 Art. IX, sec. 6	Art. IX, sec. 6
Illinois (*ILCS Const.*)	–	Art. I, sec. 3	Art. X, sec. 3	Art. I, sec. 3	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Indiana (*IN Const.*)	–	Art. I, sec. 4	Art. I, sec. 4	Art. I, sec. 4	–
Iowa (*I.C.A. Const.*)	Art. I, sec. 3	–	–	Art. I, sec. 3	–
Kansas (*K.S.A. Const. Bill of Rights*)	–	Sec. 7	Sec. 7	Sec. 7	–
Kentucky (*KY Const.*)	–	Bill of Rights, sec. 5	Education, sec. 189	Bill of Right, sec. 5	–
Louisiana (*LSA-Const.*)	Art. I, sec. 8	–	–	–	–
Maine (*M.R.S.A. Const.*)	–	Art. I, sec. 3	–	–	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Maryland (*MD Constitution, Declaration of Rights*)	–	–	–	Art. 36	–
Massachusetts (*M.G.L.A. Const.*)	–	Art. XI	–	–	–
Michigan (*M.C.L.A. Const.*)	–	–	Art. I, sec. 4 Art. VII, sec. 2	Art. I, sec. 4	–
Minnesota (*M.S.A. Const.*)	–	Art. I, sec. 16	Art. I, sect. 16 Art. XIII, sec. 2	Art. I, sec. 16	–
Mississippi (*MS Const.*)	–	Art. III, sec. 18	Art. VIII, sec. 208	–	–
Missouri (*V.A.M.S. Const.*)	–	Art. I, sec. 7	Art. I, sec. 7 Art. IX, sec. 8	Art. I, sec. 6	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Montana (*MT Const.*)	Art. II, sec. 5	–	Art. X, sec. 6	Art. X, sec. 7	Art. X, sec. 7
Nebraska (*NE Const.*)	–	Art. I, sec. 4	–	Art. I, sec. 4	–
Nevada (*N.R.S. Const.*)	–	Art. I, sec. 4	Art. XI, sec. 10	–	Art. XI, 9
New Hampshire (*N.H. Const.*)	–	Part I, Art. 6	Part I, Art. 6	Part I, Art. 6	–
New Jersey (*N.J.S.A. Const.*)	Art. I, sec. 4	Art. I, sec. 4	Art. I, sec. 3	Art. I, sec. 3	–
New Mexico (*NM Const.*)	–	Art. II, sec. 11	Art. XII, sec. 3	Art. II, sec. 11 Art. XII, sec. 9	–
New York (*McKinney's Const.*)	–	Art. I, sec. 3	Art. XI, sec. 3	–	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
North Carolina (*N.C.G.S.A.*)	–	Art. I, sec. 13	–	Art. I, sec. 13	–
North Dakota (*NDCC Const.*)		Art. I, sec. 3	Art. VIII, sec. 5		Art. VIII, sec. 1
Ohio (*OH Const.*)	–	Art. I, sec. 7	–	Art. I, sec. 7	–
Oklahoma (*OK Const.*)	–	–	Art. II, sec. 5	–	Art. I, sec. 5
Oregon (*OR Const.*)	–	–	Art. I, sec. 5	–	–
Pennsylvania (*PA Const.*)	–	Art. I, sec. 3	Art. III, sec. 15	Art. I, sec. 3	–
Rhode Island (*RI Const.*)	–	–	–	Art. I, sec. 3	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
South Carolina (*S.C. Const.*)	Art. I, sec. 2	–	Art. XI, sec. 4	–	–
South Dakota (*SD Const.*)	–	Art. VI, sec. 3	Art. VI, sec. 3	Art. VI, sec. 3	Art. VIII, sec. 16
Tennessee (*TN Const.*)	–	At. I, sec. 3	–	Art. I, sec. 3	–
Texas (*Vernon's Ann. Texas Const.*)	–	Art. I, sec. 6	–	Art. I, sec. 6	–
Utah (*U.C.A. 1953, Const.*)	Art. I, sec. 4	Art. I, sec. 4	Art. I, sec. 4 Art. X, sec. 9	–	–
Vermont (*VT Const.*)	–	–	–	Chap. I, art. 3	–

State (*Citation*)	No Establishment	No Preference	No Expenditure Of Public Funds	No Compulsion	No Religious Instruction In Public Education
Virginia (*VA Const.*)	Art. I, sec. 16	Art. I, sec. 16	Art. I, sec. 16; Art. IV, sec. 16	Art. I, sec. 16	Art. VIII, sec. 10
Washington (*RWCA Const.*)	–	–	Art. I, sec. 11; Art. IX, sec. 4	–	Art. IX, sec. 4
West Virginia (*WV Const.*)	–	Art. III, sec. 15	Art. III, sec. 15	Art. III, sec. 15; Art. III, sec. 15(a)	–
Wisconsin (*W.S.A. Const.*)	–	Art. I, sec. 18	Art. I, sec. 18	Art. I, sec. 18	Art. X, sec. 3
Wyoming (*WY Const*)	–	–	Art. I, sec. 19 Art. VII, sec. 8	–	Art. VII, sec. 12

Jefferson's Letter to the Danbury Baptists

The Draft and Recently Discovered Text

To messers Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut.

Gentlemen

The affectionate sentiments of esteem & approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. my duties dictate a faithful & zealous pursuit of the interests of my constituents, and, in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more & more pleasing.

Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" thus building a wall of eternal separation between Church & State. ***Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect,***

[Jefferson first wrote: "confining myself therefore to the duties of my station, which are merely temporal, be assured that your religious rights shall never be infringed by any act of mine and that." These lines he crossed out and then wrote: "concurring with"; having crossed out these two words, he wrote: "Adhering to this great act of national legislation in behalf of the rights of conscience"; next he crossed out these words and wrote: "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience I shall see with friendly dispositions the progress of those sentiments which tend to restore to man all his natural rights, convinced that he has no natural rights in opposition to his social duties."]

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & the Danbury Baptist [your religious] association assurances of my high respect & esteem.

Th Jefferson
Jan. 1. 1802.

[SEAL] **U.S. Department of Justice**

Civil Rights Division

[Address Omitted In Printing]

December 16, 2004

By Facsimile and Mail

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Re: Plano Independent School District

Dear Counsel:

The Department of Justice is conducting a preliminary inquiry into the circumstances surrounding your federal lawsuit regarding the Plano Independent School District's (the "District") alleged refusal to permit students to distribute religious messages during school parties and on school property. The Department is authorized to intervene in suits against public school districts alleging a denial of equal protection of the laws on the basis of religion. 42 U.S.C. 2000h-2. The purpose of this letter is to request any information that would assist us in evaluating the allegations in the Complaint and the appropriateness of any actions taken in response. We stress that the Department has not made any determination about the merits of the allegations but is simply conducting a preliminary inquiry into the matter.

Accordingly, we ask that the plaintiffs please provide the following information:

1. All pleadings, affidavits, and exhibits filed in this lawsuit and all future pleadings as they become available.
2. All correspondence or other written communication between the District and the Morgan, Wade, Versher, and Snell families or representatives of the families concerning the allegations in the Complaint.
3. Any other information that would be helpful to our understanding of the facts concerning any matters referenced in the Complaint.

Please provide us the requested information no later than January 14, 2005. If you have any questions or if you wish to discuss this matter, please contact

Sincerely,

/s/ Jeremiah Glassman
Jeremiah Glassman
Section Chief

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JONATHAN MORGAN, et.al,	§	
Plaintiffs,	§	**CIVIL ACTION**
	§	**No.: 4:04 CV 447**
vs.	§	
THE PLANO INDEPENDENT SCHOOL DISTRICT, et. al,	§	
	§	
Defendants.	§	

TEMPORARY RESTRAINING ORDER

(Filed Dec. 16, 2004)

On this day the court heard and considered Plaintiffs' Application for Temporary Restraining Order. The court has reviewed Plaintiffs' Original Complaint, Plaintiffs' Application for Temporary Restraining Order and the evidence attached to Plaintiffs' Application, and the certification of Plaintiffs' counsel's conference and delivery of materials to counsel representing the Defendants.

The court finds that there is evidence that Plaintiffs will suffer irreparable injury if the court does not grant the Temporary Restraining Order and that the injury will occur immediately.

The court, after notice to the Defendants and a hearing on the same, finds that the Temporary Restraining Order should be granted, because the "winter break" parties are scheduled to begin at 11:00 a.m. on Friday, December 17, 2004. The court further finds that the injury to the Plaintiffs' is irreparable if the Court does not act,

and there is a substantial likelihood that Plaintiffs will prevail on the merits. The Court further finds that the harm to the Plaintiffs outweighs Defendants' governmental interest in imposing the regulation and the public interest is best served by granting Plaintiffs' request. On the basis of these findings of the court and after consideration of the law and evidence presented, the court enters the following Temporary Restraining Order.

IT IS ORDERED that Defendants and Defendants' officers, agents, servants, employees, attorneys, confederates and all other persons in active concert or participation with Defendants, be enjoined immediately:

a. From interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 "winter break" parties at Plano Independent School District schools unless the gifts cause a material and substantial disruption of the school's operations;

b. From interfering with or prohibiting Plaintiffs, Doug Morgan and Robin Morgan, from distributing religious viewpoint gifts to other parents at the December 17, 2004 "winter break" parties at Plano Independent School District schools unless the gifts cause a material and substantial disruption of the school's operations;

c. From committing any acts calculated to cause students to feel embarrassed, uncomfortable, or fearful because of a student's exercise of a legal right;

d. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, be notified

immediately of the Court's Temporary Restraining Order;

e. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, notify all parents and others involved with the PISD of the Court's order by distributing a copy of the Court's order through the PISD "e-news subscriber" system; and,

f. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, post a copy of Court's Order in a conspicuous location at each PISD elementary school at which Winter Break parties are being held on Friday, December 17, 2004.

The court finds that no bond is necessary.

This order expires on the 24 day of December, 2004.

The clerk of the court is ordered to issue notice of this order to all parties immediately.

SIGNED on the 16 day of December, 2004, at 4:45 ~~A.M.~~/P.M.

/s/ Paul Brown
UNITED STATES DISTRICT
COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JONATHAN MORGAN, by and through his parents and legal guardians, DOUG MORGAN and ROBIN MORGAN, DOUG MORGAN, individually, ROBIN MORGAN, individually, MICHAEL and KEVIN SHELL, by and through their parents and legal guardians, JIM and SUNNY SHELL, MICHAELA WADE, by and through her parent and legal guardian, CHRISTINE WADE, BAILEY WADE, by and through her parent and legal guardian, CHRISTINE WADE, MALCOLM WADE, by and through his parent and legal guardian, CHRISTINE WADE, STEPHANIE M. VERSHER, by and through her parent and legal guardian, SHERRIE VERSHER, and SHERRIE VERSHER, individually,	**CIVIL ACTION**
	No.: 4:04 CV 447
	JURY TRIAL DEMANDED
	PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, NOMINAL DAMAGES, PUNITIVE DAMAGES, ATTORNEY'S FEES AND COSTS FOR CONSTITUTIONAL VIOLATIONS
	(Filed December 16, 2004)
Plaintiffs,	
vs.	

THE PLANO INDEPENDENT SCHOOL DISTRICT, LYNN [2] SWANSON, in her individual capacity and as Principal of Thomas Elementary School, LISA LONG, in her individual capacity and as Principal of Wells Elementary School, SUZIE SNYDER, individually, JACKIE BOMCHILL, in her individual capacity, and as Principal of Rasor Elementary School, JOHN BEASLEY, individually, and CAROLE GRIESDORF, in her individual capacity and as the Assistant Superintendent of the Plano Independent School DistriCT,	§
Defendants.	§

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

JONATHAN MORGAN, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, DOUG MORGAN AND ROBIN MORGAN (HEREINAFTER REFERRED TO AS "JONATHAN MORGAN"), DOUG MORGAN, INDIVIDUALLY, (HEREINAFTER REFERRED TO AS "DOUG MORGAN"), ROBIN MORGAN, INDIVIDUALLY, (HEREINAFTER REFERRED TO AS "ROBIN MORGAN"), MICHAEL AND KEVIN SHELL BY AND THOUGH THEIR PARENTS AND LEGAL [3] GUARDIANS, JIM

AND SUNNY SHELL (HEREINAFTER REFERRED TO AS "MICHAEL SHELL" AND "KEVIN SHELL"), MICHAELA WADE, BY AND THROUGH HER PARENT AND LEGAL GUARDIAN, CHRISTINE WADE (HEREINAFTER REFERRED TO AS "MICHAELA WADE"), BAILEY WADE, BY AND THROUGH HER PARENT AND LEGAL GUARDIAN, CHRISTINE WADE (HEREINAFTER REFERRED TO AS "BAILEY WADE"), MALCOLM WADE, BY AND THROUGH HIS PARENT AND LEGAL GUARDIAN, CHRISTINE WADE (HEREINAFTER REFERRED TO AS "MALCOLM WADE"), STEPHANIE M. VERSHER BY AND THROUGH HIS [sic] PARENT AND LEGAL GUARDIAN, SHERRIE VERSHER (HEREINAFTER REFERRED TO AS "STEPHANIE M. VERSHER"), AND SHERRIE VERSHER INDIVIDUALLY, (HEREINAFTER REFERRED TO AS "SHERRIE VERSHER"), ALL OF THE ABOVE HEREINAFTER COLLECTIVELY REFERRED TO AS "PLAINTIFFS," COMPLAIN OF THE PLANO INDEPENDENT SCHOOL DISTRICT, (HEREINAFTER REFERRED TO AS THE "PISD"), LYNN SWANSON, IN HER INDIVIDUAL CAPACITY AND AS PRINCIPAL OF THOMAS ELEMENTARY SCHOOL, (HEREINAFTER REFERRED TO AS "SWANSON") Long, in her individual capacity and as Principal of Wells Elementary School, (HEREINAFTER REFERRED TO AS "LONG" Suzie Snyder, in her individual [4] capacity, (HEREINAFTER REFERRED TO AS "SNYDER"), Jackie Bomchill, in her individual capacity, and as Principal of Rasor Elementary School, (HEREINAFTER REFERRED TO AS "Bomchill"), John Beasley, in his individual capacity, (HEREINAFTER REFERRED TO AS "Beasley") and Carole Griesdorf, in her individual capacity and in her capacity as Assistant Superintendent of the Plano Independent School DistriCT (HEREINAFTER REFERRED

TO "Griesdorf") (all hereinafter be collectively referred to as "Defendants") and, say as follows:

I.

NATURE OF SUIT GENERALLY AND GENERAL NATURE OF RELIEF SOUGHT

1.1. This civil action is necessary because of Defendants' continual efforts to ban Christmas from the Plano Independent School District's schools. Defendants have in the past, and continue in the present, to ban the distribution of religious messages by Plaintiffs and other students while on school property. Defendants are engaging in religious viewpoint discrimination in violation of clearly established law. Defendants continue to ban the use of the colors red or green at Christmas parties being conducted at Plano schools. Defendants ban the distribution of Christmas [5] messages by students of the school district. Defendants' ban is discriminatory and is clearly unlawful.

1.2. Defendants have in the past, and continue in the present, to prohibit students enrolled in PISD schools from distributing the Christmas message of "The Legend of the Candy Cane" to other students while on school property. Defendants have in the past, and continue, in the present to ban and censor students' distribution of pencils to classmates which contain the Christmas message, "Jesus is the Reason for the Season." Defendants have in the past, and continue in the present, to ban all colors or symbols which represent Christmas from PISD schools and require that only "white" colors and secular symbols be utilized at PISD Christmas school parties. Defendants have in the past, and continue in the present, to prohibit students from

distributing to other students invitations to religious events while on school property. Defendants' actions are clearly unlawful and evidence the religious viewpoint discrimination by the Defendants.

1.3. This is a suit for a temporary restraining order, a preliminary and permanent injunction, Declaratory Judgment, actual damages, nominal damages, punitive damages and to recover attorney's fees and costs. Plaintiffs seek a Declaratory Judgment that the policies, customs, practices, usages, rules, [6] procedure and conduct of the Defendants, as enforced by Defendants and school officials, and as promulgated by the PISD's Board of Trustees is a violation of the United States Constitution and violates several specific federal and state statutes. Plaintiffs seek a temporary restraining order, and a preliminary and permanent injunction, from the Court prohibiting the illegal and unlawful acts of the Defendants.

1.4. This suit arises because of the unconstitutional and illegal actions of the Defendants in enforcing a policy, practice, custom, usage, rule or procedure and putting such policy, practice, custom, usage, rule or procedure into effect against the Plaintiffs. Plaintiffs' constitutional rights guaranteed to Plaintiffs by, *inter alia,* the First Amendment and Fourteenth Amendment to the United States Constitution and Article I, §8 of the Texas Constitution have been violated by the policy, practice, custom, usage, rule, procedure and conduct of the Defendants as enforced against the Plaintiffs as stated herein

1.5. Plaintiffs have a clearly protected right under the First and Fourteenth Amendments to the United Stated Constitution and under Article I, §8 of the Texas Constitution to engage in speech, including

the distribution of materials while the Plaintiffs are on PISD school property. Plaintiffs have a [7] clearly established Constitutional Right to engage in the exercise of their religious faith by the dissemination of gifts and materials while at school and to engage their classmates in the discussion of religious issues. Plaintiffs have a clearly established Constitutional Right to distribute religious material and literature while at school and to give religious gifts to their classmates while at school without interference of the Defendants. The policies, practices, customs, usages, rules, procedures, and conduct of the Defendants violate the Constitutional guarantees to the Plaintiffs and constitute a deprivation under the First and Fourteenth Amendments of the fundamental right of the Plaintiffs to associate with those of common religious belief, to distribute material to peers and classmates while at school, to engage in speech while at school, to give religious materials or gifts to classmates while at school, to exercise the Plaintiffs sincerely held religious beliefs and to be protected from unequal application of the law and policies.

1.6. The policy, practice, custom, rule, procedure and conduct of the Defendants as enforced against the Plaintiffs in order to deprive the Plaintiffs of the rights, in addition to the First and Fourteenth Amendments of the United States Constitution, Article I, §8 of the Texas Constitution, 42 U.S.C. § [8] 1983, and Chapter 110.001 et.seq. of the Texas Civil Practice and Remedies Code, and the protections of the Equal Protection Clause.

1.7. Defendants conduct, as described more fully herein, is per se unlawful because Defendants have engaged in religious viewpoint discrimination.

1.8. Defendants have violated, and are currently violating clearly established law.

1.9. Defendants have fair notice that Defendants conduct is clearly unlawful.

1.10. Defendants conduct is "reckless" and "callous indifference" to the legal rights of the Plaintiffs.

1.11. Defendants' conduct violates the Equal Protection Clause of the Fourteenth Amendment.

1.12. Defendants' conduct violates the "hybrid" rights of the Plaintiffs.

1.13. Plaintiffs seek immediate, preliminary, and permanent injunctive relief, a Declaratory Judgment of this Court that the policy, practice, custom, usages, rules, procedures and conduct of the Defendants is a violation of the First and Fourteenth Amendments and the penumbra of speech, religious, liberty, association, equal protection, and due process rights protecting the legal rights of the Plaintiffs, and Article I, §8 of the Texas Constitution. Plaintiffs also seek punitive damages in an amount to be awarded by the Jury and nominal damages for the conduct and actions of the Defendants. Plaintiffs [9] will request the Court to enter a Declaratory Judgment that the policies, practices, customs, usages, rules, procedures and conduct of the Defendants violate clearly established law.

1.14. PISD's policies are unlawful on their face.

1.15. PISD's policies are unlawful as applied to Plaintiffs, but were applied by the individual Defendants as intended by PISD.

1.16. Plaintiffs seeks a declaration, pursuant to 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, and

Chapter 110.001, et.seq. of the Texas Civil Practice and Remedies Code that the policy, practice, custom, usages, rules, procedure and conduct of the Defendants is a violation of the First and Fourteenth Amendments, and of speech, religious, association, liberty, equal protection, and due process rights guaranteed to citizens and Plaintiffs under the First and Fourteenth Amendments of the U.S. Constitution and Article I, §8 of the Texas Constitution

1.17. Plaintiffs seek the recovery of punitive damages against the individual Defendants for the clearly unlawful actions of the individual Defendants and for the individual Defendants' "reckless" conduct, and their "callous indifference" which interfered with and harmed the clearly established legal rights of the Plaintiffs.

[10] 1.18. Plaintiffs seek the recovery of nominal damages from all Defendants.

1.19. Plaintiffs seek recovery of actual damages for intentional infliction of mental anguish.

1.20. Plaintiffs seek and asks the Court to enter a temporary restraining order, and preliminary and permanent injunction to stop Defendants' unlawful conduct and prohibit Defendants from returning to their old unlawful ways.

1.21. Plaintiffs seek the recovery of their attorney's fees and costs pursuant to 42 U.S.C. § 1988 and Chapter 110.001, et.seq., and recovery of all court costs and expenses incurred to bring this action.

* * *

[20] **V.**

DEFENDANTS' POLICIES

5.1. The only policy which the Defendants' have identified which the Defendants' contend is applicable to the Plaintiffs' exercise of their lawful rights as more fully described herein, is the FNAA (LOCAL) Policy adopted by the PISD. The applicable provisions of the FNAA (LOCAL) Policy provide:

> For purposes of this policy, "distribution" means ~~the~~ circulation of **any written material, tapes or other media over which the school does not exercise control and that is intended for dissemination to students.** ~~more than ten printed copies of material from a source other than the District~~.
>
> . . .
>
> Each school campus shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed. Campus principals may develop reasonable time, place and manner restrictions regarding the distribution of materials at designated areas.

[21] PRIOR REVIEW

LIMITATIONS ON CONTENT

Nonschool materials shall not be distributed if:

5. The materials criticize Board Members or school officials . . .

5.2. The distribution of nonschool literature by nonstudents is covered by PISD policy GKD.

5.3. The PISD's policy on "limitations on content" prohibits its distribution of materials [that] criticize Board members or school officials." It is facially unlawful.

5.4. The application of the FNAA (LOCAL) policy by the Defendants against the Plaintiffs is unlawful as applied.

5.5. The FNAA (LOCAL) policy does not provide an exception for the exercise of religion or the reasonable accommodation of a student's religious belief and exercise.

5.6. The FNAA (LOCAL) policy adopted by the PISD, was modified in the fall of 2003 to redefine the definition of "distribution." Prior to the modification, the term "distribution" meant the circulation of more than "ten printed copies of materials from a source other than the District." [22] After the modification, the PISD defined the term "distribution" to mean any "circulation of any written material, tapes, or other media over which the school does not exercise control and that us [sic] intended for dissemination to students."

5.7. The new definition is not "narrowly tailored" to provide significant "government interest." It is overly broad.

5.8. The FNAA (LOCAL) PISD policy is entitled "Student Expression: Distribution of Non-School Literature."

5.9. At all material times, as alleged herein, the individual school officials and Defendants who acted, as alleged herein, were acting in accordance with PISD's adopted FNAA (LOCAL) policy.

5.9. The individual Defendants did not deviate, as understood and defined by PISD, from PISD's intended application of PISD's FNAA (LOCAL) policy when the individual Defendants acted, as alleged herein.

5.10. All actions taken by the individual Defendants, as alleged herein, were taken in accordance with, compliant with, and in furtherance of PISD's FNAA (LOCAL) policy and PISD's intended application of that policy.

5.11. PISD's FNAA (LOCAL) policy is an unlawful interference and restraint on the legal rights of the students of PISD school to engage in speech, [23] free exercise of religion, and association, and, as applied to the Plaintiffs, in the instances described herein, is a violation of the Establishment Clause of the First Amendment.

5.12. In accordance with PISD's FNAA (LOCAL) policy, as intended by PISD and as properly applied, no student while on school property may, at any time, distribute any "written material" except by placing the material on a "designated area" somewhere on the "school campus."

5.13. In accordance with PISD's FNAA (LOCAL) policy, the distribution of "written materials" on the school lawn, school sidewalks, the interior of the school buildings, including its hallways – even before or after the school day – would be prohibited because the distribution is not occurring in the "designated area."

5.14. In accordance with PISD's FNAA (LOCAL) policy, the distribution of "written materials" during free time, recess, lunch, or at school parties would be prohibited.

5.15. In accordance with PISD's FNAA (LOCAL) policy, the student-to-student distribution of "written material" cannot occur at any time while on school property. No student can ever hand his classmates any "written material" while on school property.

* * *

[153] **XXII.**

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request and pray that the Court grant the Plaintiffs the following relief:

TEMPORARY INJUNCTION RELIEF

1. That Defendants and Defendants' officers, agents, servants, employees, attorneys, confederates and all other persons in active concert or participation with Defendants, be enjoined immediately:

a. From interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 "winter break" parties at Plano Independent School District schools unless the gifts cause a material and substantial disruption of the school's operations;

b. From interfering with or prohibiting Plaintiffs, Doug Morgan and Robin Morgan, from distributing religious viewpoint gifts to other parents at the December 17, 2004 "winter break" parties at Plano Independent School District schools unless the gifts cause a material and substantial disruption of the school's operations;

[154] c. From interfering with or prohibiting Plaintiffs from converying [sic] a message by word or distribution of materials while on Plano Independent School District property that criticizes Plano Independent School District Board members or school officials unless such information causes a material and substantial disruption of the school's operations;

d. From committing any acts calculated to cause students to feel embarrassed, uncomfortable, or fearful because of a student's exercise of a legal right;

e. From destroying, altering, disposing of, consuming, tampering with or in any manner secreting any and all business records, memos, correspondence, e-mails, electronic communications or other paper and electronic documentations relating to or referring in any manner to the matter and facts alleged in this Civil Action;

f. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, be notified immediately of the Court's temporary restraining order;

[155] g. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, notify all parents and others involved with the PISD of the Court's order by distributing a copy of the Court's order through the PISD "e-news subscriber" system; and,

h. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, post a copy of Court's Order in a conspicuous location at

each PISD school and on the front door or at some other conspicuous location at each administrative building owned by the PISD.

PRELIMINARY INJUNCTIVE RELIEF

2. That after preliminary hearing, Defendants be preliminarily enjoined, unless such an action is necessary to stop a material and substantial disruption of school operations:

a. From interfering with or prohibiting Plaintiffs from distributing material or literature to fellow students while at school during non-instructional time;

[156] b. From using or imposing a prior restrain [sic] upon Plaintiffs' right to distribute literature to fellow students while at school during non-instructional time;

c. From imposing an "information table" only restriction or regulation on the manner and method for Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

d. From imposing a "curriculum only" restriction or regulation on the time, place and manner for Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

e. From imposing a viewpoint restriction or regulation on the time, place and manner for Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

f. From imposing a "religious" restriction or regulation on the Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

[157] g. From imposing a "captive audience" restriction or regulation on the Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

h. From imposing a content-based restriction or regulation on the Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

i. From imposing viewpoint restrictions or regulations on the Plaintiffs' distribution "goodie" or gift bags at the "winter break" parties at the PISD schools;

j. From imposing restrictions or regulations on the Plaintiffs' distribution of gifts at student birthday parties celebrated at PISD schools;

k. From imposing restrictions or regulations on the Plaintiffs' speech while at school during non-instructional time about the availability of free religious concert, drama or event tickets;

l. From imposing restrictions or regulations on the Plaintiffs' distribution while at school during non-instructional time of "religious" pencils or other materials with a "religious" message on them;

[158] m. From committing any acts calculated to cause students to feel embarrassed, uncomfortable, or fearful because of a students exercise of a legal right;

n. From imposing restrictions or regulations on the Plaintiffs' ability to criticize a school official or school board member while on school property;

o. From imposing restrictions or regulations on an adults' distribution of literature or materials to another adult while on school property;

p. From imposing restrictions or regulations on the Plaintiffs' religious speech while on school property during non-instructional time in a manner which does not cause a material and substantial disruption of the school operations;

q. From punishing Plaintiffs' in any way for the exercise of their legal rights and for the filing of this civil action;

r. From destroying, altering, disposing of, consuming, tampering with or in any manner secreting any and all business records, memos, correspondence, e-mails, electronic communications or other paper and electronic documentations relating to or [159] referring in any manner to the matter and facts alleged in this Civil Action;

s. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, be notified immediately of the Court's temporary restraining order;

t. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, notify all parents and others involved with the school of the Court's order by distributing a copy of the Court's order through the PISD "e-news subscriber" system;

u. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, post a copy of Court's Order in a conspicuous location at each PISD school and on the front door or at some other conspicuous location at each administrative building owned by the PISD for 60 days after the date of the Order.

PERMANENT INJUNCTIVE RELIEF

3. That after the trial, Defendants be permanently enjoined, unless such [160] action is necessary to stop a material and substantial disruption of school operations:

a. From interfering with or prohibiting Plaintiffs from distributing material or literature to fellow students while at school during non-instructional time;

b. From using or imposing a prior restrain [sic] upon Plaintiffs' right to distribute literature to fellow students while at school during non-instructional time;

c. From imposing an "information table" only restriction or regulation on the manner and method for Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

d. From imposing a "curriculum only" restriction or regulation on the time, place and manner for Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

e. From imposing a viewpoint restriction or regulation on the time, place and manner for Plaintiffs'

distribution of material or literature to fellow students while at school during non-instructional time;

[161] f. From imposing a "religious" restriction or regulation on the Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

g. From imposing a "captive audience" restriction or regulation on the Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

h. From imposing a content-based restriction or regulation on the Plaintiffs' distribution of material or literature to fellow students while at school during non-instructional time;

i. From imposing viewpoint restrictions or regulations on the Plaintiffs' distribution "goodie" or gift bags at the "winter break" parties at the PISD schools;

j. From imposing restrictions or regulations on the Plaintiffs' distribution of gifts at student birthday parties celebrated at PISD schools;

k. From imposing restrictions or regulations on the Plaintiffs' speech while at school during non-instructional time about the availability of free religious concert, drama or event tickets;

[162] l. From imposing restrictions or regulations on the Plaintiffs' distribution while at school during non-instructional time of "religious" pencils or other materials with a "religious" message on them;

m. From committing any acts calculated to cause students to feel embarrassed, uncomfortable, or

fearful because of a students exercise of a legal right;

n. From imposing restrictions or regulations on the Plaintiffs' ability to criticize a school official or school board member while on school property;

o. From imposing restrictions or regulations on an adults' distribution of literature or materials to another adult while on school property;

p. From imposing restrictions or regulations on the Plaintiffs' religious speech while on school property during non-instructional time in a manner which does not cause a material and substantial disruption of the school operations;

q. From punishing Plaintiffs' in any way for the exercise of their legal rights and for the filing of this civil action;

[163] r. From destroying, altering, disposing of, consuming, tampering with or in any manner secreting any and all business records, memos, correspondence, e-mails, electronic communications or other paper and electronic documentations relating to or referring in any manner to the matter and facts alleged in this Civil Action;

s. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, be notified immediately of the Court's temporary restraining order;

t. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, notify all parents and others involved with the school of the Court's order by distributing a copy of the Court's

order through the PISD "e-news subscriber" system;

u. That Defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, post a copy of Court's Order in a conspicuous location at each PISD school and on the front door or at some other conspicuous [164] location at each administrative building owned by the PISD for 60 days after the date of the Order.

4. That Defendants be required to file with the Court and serve on Plaintiffs within ten (10) days after the Court's entry of the temporary restraining order, preliminary injunction, and permanent injunction, a report in writing under oath, setting forth in detail the manner and form in which Defendants have complied with the Court's Order.

5. That Plaintiffs be awarded nominal damages;

6. That Plaintiffs be awarded punitive damages against Defendants, except PISD (which is banned by law).

7. That Plaintiffs be awarded actual damages.

8. That Plaintiffs be awarded Plaintiffs' costs and reasonable attorney's fees in this court and all other courts.

9. That the Judgment of Court awarding the relief requested by the Plaintiffs against the Defendants be jointly and severally awarded.

10. That Plaintiffs be awarded pre-judgment and post-judgment interest, to the extent permitted at law.

11. That the Court enter an Declaratory Judgment declaring that the Defendants' conduct and actions:

[165] a. Violate clearly established legal rights of the Plaintiffs;

b. Violate laws which Defendant had fair notice of;

c. Violate the First Amendment Speech Clause;

d. Violate the Fourteenth Amendment Equal Protection Clause;

e. Violate the First Amendment Free Exercise Clause;

f. Violate the First Amendment Establishment Clause;

g. Violate 42 U.S.C. §1983;

h. By the PISD were deliberately indifferent to Plaintiffs' legal rights;

i. Were taken in furtherance of and pursuant to policies adapted by the PISD;

j. By the PISD in adapting the policies are facially and as applied unlawful;

k. Violate Article I, §8 of the Texas Constitution;

l. Violate Chapter 110.001 et seq. of the Texas Civil Practices and Remedies Code;

m. Are viewpoint restrictions on speech which are *per se* unlawful;

n. Are content-based restrictions on speech which are unlawful;

o. Require strict scrutiny review;

p. By the individual Defendants were "reckless";

[166] q. By the individual Defendants were done with "callous indifference" to Plaintiffs' legal rights;

r. Were applied in an unlawful manner;

s. Denying Plaintiff's request to distribute religious literature to be invalid under the First and Fourteenth Amendment to the United States Constitution and under Texas law;

t. Unlawfully obstructed Plaintiffs from exercising Plaintiffs' constitutionally protected rights by:

(a) Subjecting Plaintiffs to an unconstitutional prior restraint on literature distribution;

(b) Preventing Plaintiffs from distributing religious literature to fellow students during non-instructional time based on the content or viewpoint of the literature;

(c) Treating Plaintiffs' literature unequally with secular or nonreligious literature;

(d) Prohibiting Plaintiffs from distributing literature to fellow students at any time or place during the school day.

[167] 12. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's permanent injunctive order and review Defendants' compliance with the Court's permanent injunction;

13. That Plaintiffs have such other and further relief, both at law and in equity, as the Court deems just and right.

Respectfully submitted,

By: /s/ _____

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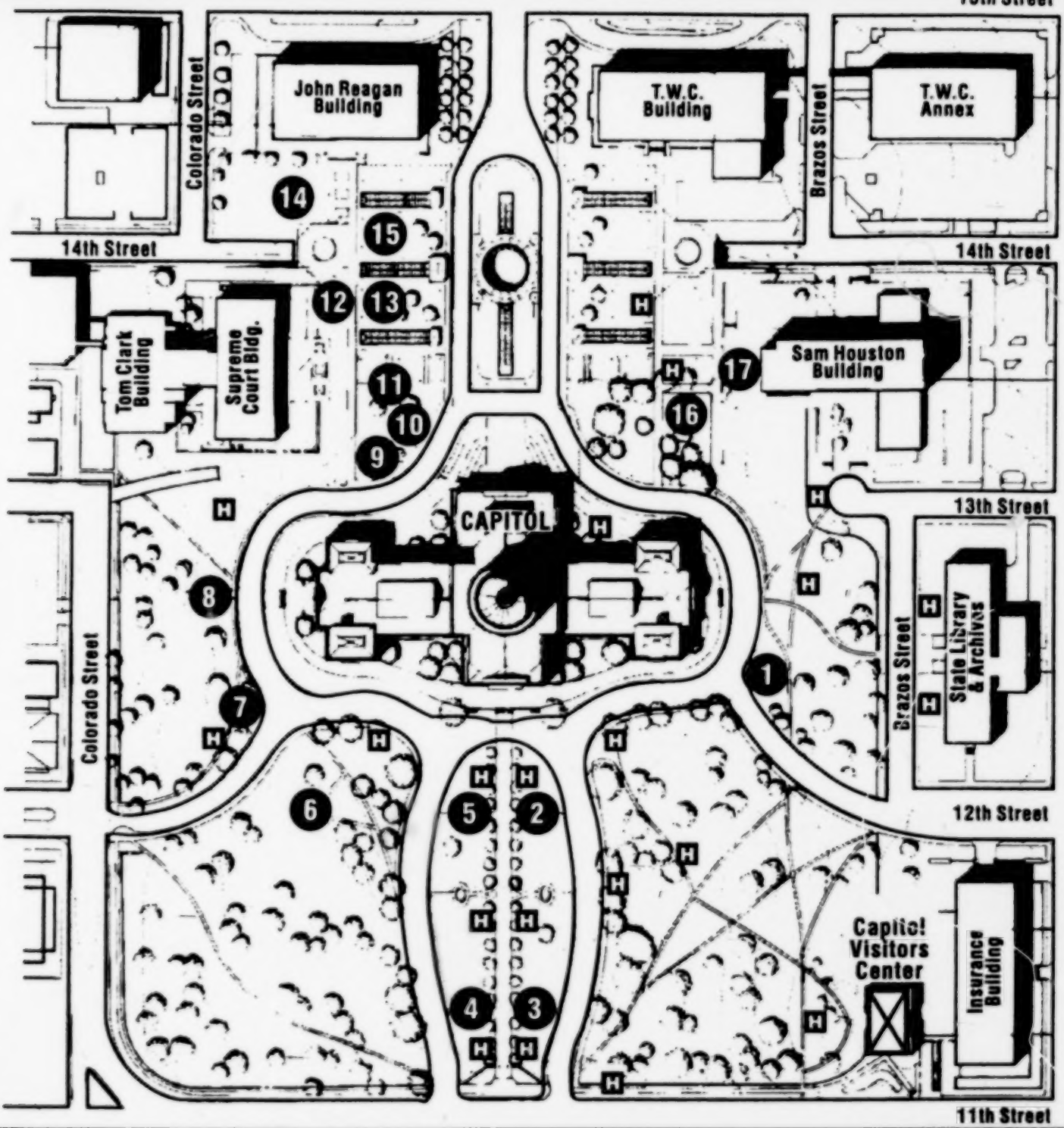

1. Hood's Brigade
2. Heroes of the Alamo
3. Confederate Soldiers
4. Volunteer Firemen
5. Terry's Texas Rangers
6. Texas Cowboy
7. "The Hiker"
8. 36th Infantry
9. Ten Commandments
10. Tribute to Texas Children
11. Texas Pioneer Woman
12. Statue of Liberty Replica
13. Pearl Harbor Veterans
14. Korean War Veterans
15. Soldiers of World War I
16. Disabled Veterans
17. Texas Peace Officers

H = Historical Marker

CAPITOL MONUMENT GUIDE

NORTH

NOTE: The diagram above has been simplified for clarity and does not accurately reflect all details of the actual grounds.

EXHIBIT
47
A-01-CA-833-H

TEXAS CAPITOL MONUMENT GUIDE

1. **HOOD'S TEXAS BRIGADE** – Erected 1910 by surviving comrades and friends.
   A gray granite shaft, with hand-carved quotes by President Jefferson Davis, General Robert E. Lee, and others, is topped by the bronze figure of a Confederate soldier. The monument stands as a memorial to the members of John B. Hood's Texas Brigade Army of Northern Virginia. Principal battles, during which some 4000 soldiers in the division died defending the South throughout the Civil War, are listed on the base. The bronze figure was executed by Pompeo Coppini.

2. **HEROES OF THE ALAMO** – Erected 1891 by the State of Texas.
   A bronze statue of a Texan holding a muzzle-loader rifle stands atop a Texas Sunset Red granite base. In 1836, during a 13 day siege, about 187 Texans under the command of William B. Travis, lost their lives defending the Alamo fort against Mexican General Santa Anna's army of more than 5000. Names of the Texans who died in the battle, including James Bowie and David Crockett, are inscribed upon the four granite supports. Monument designed by J. S. Clark.

3. **CONFEDERATE SOLDIERS** – Unveiled 1903 by surviving comrades.
   Five bronze figures on a gray granite base represent the Infantry, Cavalry, Artillery, and Navy, headed by the Confederate president, Jefferson Davis. Etched in the base are the 13 states which withdrew from the Union and formed the Southern Confederacy, as well as the battles fought between 1861 and 1865. The bronze figures were executed by Pompeo Coppini. Monument erected by Frank Teich.

4. **VOLUNTEER FIREMEN** – Erected 1896 by the State Firemen's Association of Texas.

A bronze figure of a fireman carries a frightened child in his left arm and a lantern in his right. On the granite base are inscribed names of those Texan volunteers who have lost their lives fighting fires.

5. **TERRY'S TEXAS RANGERS** – Erected 1907 by surviving comrades.
The bronze statue, by Pompeo Coppini, portrays one of Terry's Texas Rangers astride a spirited horse. In 1861, during the Civil War, Terry's Texas Rangers were mustered at Houston after Benjamin Terry and Thomas Lubbock's call for volunteers. Ten companies of 100 men each were formally activated as the 8th Texas Calvary, and during the following five years participated in many engagements defending the Southern Confederacy.

6. **TEXAS COWBOY** – Erected in 1925.
The bronze statue was presented to the State of Texas, "native home of the Cowboy," by the notable American sculptor Constance Whitney Warren. It represents the artists portrayal of a typical Texas cowboy riding a rearing horse, and is a tribute to the "rough and romantic riders of the range."

7. **"THE HIKER"** – Erected 1951 by the Spanish-American War Veterans and Auxiliaries of Texas. The bronze statue of a soldier, mounted on a Texas Sunset Red granite pedestal, honors the memory of all the Veterans of the Spanish-American War (1891-1902). It was executed by the Gorham Company of Providence, Rhode Island.

8. **VETERANS OF THE 36th INFANTRY** – Erected 1959.
Hewn of Texas Sunset Red granite in the shape of the "T-Patch", the shoulder insignia of the 36th Infantry, Texas National Guard, the monument memorializes the fighting men of the 36th Infantry. The Division is credited with freeing Rheims, France, during World

War I, and was the first American division to invade Europe during World War II.

9. **THE TEN COMMANDMENTS** – Erected 1961 by the Fraternal Order of Eagles of Texas.
Hewn from Texas granite in the traditional shape of the biblical stones and inscribed with the Ten Commandments, the monument was presented to the people and youth of Texas.

10. **TRIBUTE TO TEXAS CHILDREN** – Erected 1998 by the school children of Texas. The life-sized bronze figures by Lawrence Ludtke, installed at ground level, depict six children on a field trip to the Texas Capitol. The monument honors and celebrates the youth of Texas.

11. **TEXAS PIONEER WOMAN** – Erected 1998 by the Daughters of the Republic of Texas, District VIII. Honoring the pioneer women of early Texas, a life-sized bronze figure by Linda Sioux Henley depicts a young pioneer mother with baby on her arm. The statue stands atop a Texas Sunset Red granite pedestal.

12. **STATUE OF LIBERTY REPLICA** – Erected 1951 by the Boy Scouts of America.
The bronze miniature Statue of Liberty, mounted on a native limestone base, was presented to the State of Texas as a "pledge of everlasting fidelity and loyalty." The statue was relocated from the south grounds to a new pedestal on the north grounds in 1997. A time-capsule buried nearby is to be opened by Scout officials in 2076.

13. **PEARL HARBOR** – Erected 1989 by the Pearl Harbor Survivors of Texas.
Dedicated to honor those men and women from Texas in the military services who were present on the Island of Oahu, Territory of Hawaii, on December 7, 1941, when the Japanese bombed Pearl Harbor.

14. **KOREAN WAR VETERANS MEMORIAL** – Erected 1998 by the Texas Lone Star Chapter of the Korean War Veterans Association. The star-shaped memorial is dedicated to the more than 289,000 Texans who served in the Korean War, and incorporates the names of the 1723 Texans either killed in action or missing in action. (Source list: National Archives and Records Administration, website: www.nara.gov) A bronze eagle by sculptor Edward L. Hankey crowns the memorial.

15. **WORLD WAR I** – Erected 1961 by the membership of the Department of Texas, Veterans of Foreign Wars. Constructed of Texas Sunset Red granite, and listing the barracks and auxiliaries that participated in its erection, this monument is dedicated to the memory of World War I veterans.

16. **DISABLED AMERICAN VETERANS OF TEXAS** – Erected 1980 by the membership of the Disabled American Veterans and Auxiliary, Department of Texas. The monument is dedicated to all Texan veterans who have been disabled while serving in the U.S. military services.

17. **TEXAS PEACE OFFICERS MEMORIAL** – Erected 1999 by the Texas Commission on Law Enforcement in cooperation with the State Preservation Board. The memorial was authorized by the 71st Legislature in 1989 to honor law enforcement officers and corrections personnel whose lives have been lost in the line of duty since August 5, 1823, the date when Stephen F. Austin commissioned the first Texas Peace Officers, the first ten Texas Rangers. For information on names already inscribed or names to be inscribed, please contact:

    Texas Commission on Law Enforcement, 6330
    U.S. Hwy.290 East, Suite 200, Austin, TX 78723

Attn: Edward Laine, Chief (or Rita Delgado, Executive Assistant)
Phone: (512) 936-7722 Fax: (512) 936-7714
State Preservation Board, Revised: 5/7/01

No. 03-1500

Supreme Court, U.S.
FILED
JAN 12 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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Question Presented for Review

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property on the walkway between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Department of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys regularly handle First Amendment cases that concern the interplay between the Establishment Clause and the Free Speech and Free Exercise Clauses. The Institute has published educational materials and taught courses in this area as well.

The Rutherford Institute supports the Respondents in this case because the Fifth Circuit's judgment and opinion recognize the important place the Ten Commandments occupies in the development of the law, both in this country and worldwide. Equally important, the Fifth Circuit's decision establishes as precedent that religious symbols

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief. The Rutherford Institute expresses its gratitude for the research assistance provided by J. Charlton Wimberly.

need not be wholly purged from public life and may be recognized as an important part of our heritage.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Respondents.

SUMMARY OF ARGUMENT

The historic Ten Commandments monument, which has resided for forty-two years among the other historic monuments on the grounds of the Texas State Capitol, does not constitute a government endorsement of religion. The monument's context establishes that it is merely one of many commemorations of the history and culture of Texas. The Fifth Circuit's opinion makes this point clearly, and *Amicus* respectfully submits that this Court should affirm the Fifth Circuit's decision.

First, the mere presence on government property of a monument with religious themes is not a violation of the Establishment Clause. Such a monument only violates the United States Constitution if a reasonable observer would believe that the government endorses the monument's religious message. However, Petitioner seeks to do away with the endorsement test's reasonable observer standard and proposes a new "field of vision" test to take its place. Under Petitioner's proposed "field of vision" test, this Court's endorsement analysis would focus merely on what a viewer can see, rather than on what a reasonable observer, acquainted with the context and history of the monument and its forum, would know. Petitioner's proposed test has no basis in case law, and it should be rejected.

When analyzed under the proper reasonable observer standard, the presence of the Ten Commandments

Monument behind[2] the Texas State Capitol—one of seventeen monuments on the historic twenty-two acre capitol grounds—is not a government endorsement of religion. Rather, it is in the equivalent of a museum context, which negates government endorsement of the monument's religious message.

Second, the Fifth Circuit's decision is consistent with this Court's prior decisions on religious displays, as well as with the decisions of other Circuit Courts of Appeals concerning Ten Commandments monuments in or near government buildings.

Finally, the Establishment Clause mandates that government remain neutral between religion and non-religion. Petitioner requests that this Court abandon the reasonable observer standard and instead legalize the heckler's veto. This would result in the whitewashing of our nation's religious history and would fall far short of the neutrality required by the Establishment Clause.

Amicus respectfully submits that this Court should affirm the Fifth Circuit's decision.

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[2] Petitioner's Brief asserts that the Ten Commandments monument is located "directly in front of the Texas State Capitol." Br. for Pet'r at 30. However, the Fifth Circuit's opinion states that the Capitol Building's "main entry" is on its south side, while the Ten Commandments monument is located seventy-five feet away from the Capitol Building's *north* side. *Van Orden*, 351 F.3d at 176.

ARGUMENT

I. THE FIFTH CIRCUIT PROPERLY HELD THAT MAINTENANCE OF THE FORTY-TWO-YEAR-OLD TEN COMMANDMENTS MONUMENT AMONG SIXTEEN OTHER MONUMENTS ON THE HISTORIC GROUNDS OF THE TEXAS STATE CAPITOL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BY UNCONSTITUTIONALLY ENDORSING RELIGION.

A. Petitioner's Proposed "Field of Vision" Test—Which Directly Contradicts the Endorsement Analysis, Ignores the Reasonable Observer Standard, and Has No Basis in Case Law—Should Be Rejected.

Whether or not a display has the effect of endorsing religion depends upon whether a "reasonable observer" would consider the display to constitute a government endorsement of religion. *See County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 620 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (stating that, when considering a religious display, "the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer'").

When applying the endorsement test, the reasonable observer is "deemed more informed than the casual passerby." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment). The "knowledge attributed to the reasonable observer" cannot "be limited to the information gleaned simply from viewing the challenged display." *Id.* at 780. Rather, the reasonable observer is deemed to be "aware of the history and context of the community and forum in which the religious display appears." *Id.*

Petitioner rejects the reasonable observer standard. While a substantial portion of Petitioner's Brief is devoted to the discussion of endorsement, nowhere does the brief attempt to define "reasonable observer" or discuss what facts a reasonable observer would know. Instead, Petitioner's Brief proposes a "field of vision" test, asserting that—when determining context for purposes of the endorsement test—"the appropriate focus must be on what the viewer of the Ten Commandments monument sees in looking at [the monument] and the area immediately around it." Br. for Pet'r at 35. This "field of vision" test is a major component of Petitioner's argument and is alluded to throughout Petitioner's Brief. *See, e.g.*, Br. for Pet'r at 3 ("[N]o other monument is visible from the Ten Commandments monument . . . ."); *id.* at 29 (noting that "no other monuments [are] visible when standing before" the Ten Commandments monument); *id.* at 33 ("No monument or display is next to, or even visible from, the Ten Commandments monument."); *id.* at 34 (suggesting that, in *Lynch v. Donnelly*, 465 U.S. 668 (1983), "all of the symbols [were] within the view of the observer"); *id.* at 35 (asserting that "the appropriate focus must be on what the viewer of the Ten Commandments monument sees"); *id.* at 36 (noting that, in *Allegheny*, "the viewer saw only the crèche and its floral frame").

Petitioner's proposed "field of vision" test is directly contradictory to the endorsement test. Whereas the endorsement test considers a reasonable observer with knowledge beyond what can be "gleaned simply from viewing" the monument, *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment), Petitioner's proposed test would *limit* analysis to what any single observer can "glean[] simply from viewing" the monument "and the area immediately around it." Br. for Pet'r at 35.

Not only does Petitioner's proposed "field of vision" test contradict the endorsement test, it also has no basis in case law. Petitioner's Brief ostensibly relies on *Lynch* and *Allegheny* for support, but neither case is consistent with the proposed test. *Lynch* never once discusses what is in the field of vision of a person looking at the crèche at issue in that case, and the statements to which Petitioner points in *Allegheny* are taken out of context to make them look as if they support Petitioner's proposed "field of vision" test. But rather than emphasizing what is in view when looking at a contested display, both cases underscore the importance of a display's overall context.

Petitioner's Brief interprets the *Allegheny* opinion as saying that this Court "declined the government's invitation to consider decorations throughout the building and in a nearby forum as part of the crèche display." Br. for Pet'r at 36. Petitioner's Brief then immediately infers that the "[c]ontext was restricted to what the viewer saw when observing the questioned display." *Id.* However, this inference is significantly off the mark. The portion of the *Allegheny* opinion cited to support this inference, and therefore purportedly supporting Petitioner's "field of vision" test, reads as follows:

> The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Allegheny, 492 U.S. at 598 n.48. This passage, which mentions nothing about what is in an observer's field of

vision, places emphasis entirely on the fact that the crèche was "distinct from any other decorations or exhibitions in the building." The fact that the other Christmas decorations were not visible from the crèche is unrelated to the Court's reason for not considering those other decorations. If this passage *were* endorsing the field of vision test, then the second sentence would be superfluous: whether or not the crèche was part of a larger exhibit would be irrelevant as long as other displays in the exhibit were not visible from the site of the crèche. But the passage as a whole makes clear that the other decorations were not considered in the endorsement analysis because they did not, along with the crèche at issue, comprise a unified exhibit and, therefore, were not part of a context which negated the crèche's endorsement effect.

The only portion of *Allegheny* which might be construed as supporting the "field of vision" argument is the following sentence from Part I.A of Justice Blackmun's opinion: "In addition, various departments and offices within the county courthouse had their own Christmas decorations, *but these also are not visible* from the Grand Staircase." *Allegheny*, 492 U.S. at 581 (emphasis added). However, this portion of the opinion was joined by only two other Justices, meaning that whatever inference might possibly be made from the statement cannot be attributed to a majority of the Court. Also, this sentence is immediately preceded by a discussion of the fact that the crèche on the Grand Staircase is "distinct and not connected with any exhibit in the gallery forum," a nearby part of the courthouse "used for art and other cultural exhibits." *Id.* Once again, the focus of the section taken as a whole is not on what could or could not be seen from the site of the crèche, but rather on the fact that the crèche in *Allegheny* was not part of a larger exhibit.

As explained in the following section, the Ten Commandments monument is part of a larger exhibit, as was the crèche at issue in *Lynch*. It is one of seventeen historic monuments on the capitol grounds, which "are designated as a National Historic Landmark that is dedicated to the display of 'statues, memorials, and commemorations of people, ideals and events that compose Texan identity.'" *Van Orden v. Perry*, 351 F.3d 173, 180 (5th Cir. 2003) (quoting H. Con. Res. 38, 77th Leg., R.S. (2001)).

B. A Reasonable Observer Would Recognize that the Ten Commandments Monument Is Being Displayed in the Equivalent of a Museum Setting, a Context that Negates Government Endorsement of the Monument's Religious Message.

"[I]n religious-symbols cases, context is the touchstone[.]" *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (alteration in original) (citation omitted). Context is important because it can "negate any message of endorsement of [a display's] content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *accord Allegheny*, 492 U.S. at 595 (opinion of Blackmun, J., joined by Stevens, J.).

Petitioner's Brief displays a fundamental misunderstanding of how context operates in the endorsement analysis. For example, Petitioner's Brief asserts that "[i]f the State displayed a crèche in the manner and at the place where the Ten Commandments monument is located, its action would be unquestionably unconstitutional." Br. for Pet'r at 9. This argument makes no sense. By definition, context changes with situation. Since context is the touchstone in the endorsement analysis, then it does not follow that if a religious holiday decoration cannot be displayed in a location, then a historic monument cannot be displayed in that location either. Of course, a lone crèche could not be erected in place of the Ten

Commandments monument; a crèche in that location would not be part of a larger exhibit celebrating what has become a secular holiday and, therefore, would not be in a context that negates its effect of endorsing religion. However, a crèche *could* be placed in that location if it were part of a Christmas display, as in *Lynch*. Likewise, the Ten Commandments monument could not be placed among Christmas decorations in a government building; the Decalogue is not traditionally related with Christmas so the Christmas exhibit would not negate the Decalogue's religious message. However, the Ten Commandments monument *can* be displayed on the capitol grounds because it is part of a larger exhibit of seventeen historic monuments "commemorati[ng the] people, ideals and events that compose Texan identity[.]" *Van Orden*, 351 F.3d at 180 (quoting H. Con. Res. 38, 77th Leg., R.S. (2001)). The overall context created by this larger exhibit—a context of which the reasonable observer would certainly be aware—negates government endorsement of the monument's religious message.

Not only does Petitioner misunderstand context, Petitioner also fails to give the context of the Ten Commandments monument due consideration. In *Lynch*, this Court stated that the trial court had "plainly erred by focusing almost exclusively on the crèche" rather than viewing it "in the proper context of the Christmas Holiday season" and as part of a larger "display depict[ing] the historical origins of this traditional event long recognized as a National Holiday." *Lynch*, 465 U.S. at 680 (citations omitted). The trial court's mistake in *Lynch*—focusing exclusively on the crèche—is being repeated by Petitioner in this case. Petitioner's Brief focuses on the Ten Commandment's statue by itself, without considering the larger context of the Capitol grounds. *See, e.g.*, Br. of Pet'r at 9 ("The monument sits by itself . . . ."); *id.* at 29 ("The Ten

Commandments sits by itself . . . .); *id.* at 33 ("The Ten Commandments display sits on a corner by itself . . . .").

Context must be viewed from the perspective of a "reasonable observer" acquainted with "the history and context of the community and forum in which the religious display appears." *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment). In this case, the reasonable observer should be aware of the fact that the Ten Commandments monument is in the equivalent of a museum setting: it is one of seventeen monuments spread across the historic twenty-two acre Capitol grounds. The parties "stipulated that 'the Capitol, together with its grounds and the monuments erected and maintained there constituted a National Historic Landmark.'" *Van Orden*, 351 F.3d at 175. These grounds are maintained by the State Preservation Board, which qualifies as a museum under federal law, *id.* at 180 (citing 20 U.S.C. § 9172 (2003)), and the State employs a professional museum curator as Curator of the Capitol. *Id.* Also, the Visitor Services of the State publishes a written guide for walking tours of the grounds. *Id.* These are all facts concerning the "history and context of the community and forum," meaning that they are all facts of which the reasonable observer would be aware.

In *Lynch*, Justice O'Connor analogized the context of the crèche at issue there to "a typical museum setting." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). If the museum analogy is appropriate for a Christmas display in a public park, then it is certainly appropriate for a monument that is overseen with other monuments by a professional museum curator and a Board that is statutorily defined as a museum. Indeed, it would be difficult to conceive of a situation closer to a museum context without actually conceiving of a museum. This museum-like setting also "changes what viewers may fairly understand to be the

purpose of the display" by "negat[ing] any message of endorsement of that content." *Id.*

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PREVIOUS DECISIONS CONCERNING RELIGIOUS DISPLAYS AND WITH DECISIONS BY OTHER CIRCUIT COURTS OF APPEALS CONCERNING THE CONSTITUTIONALITY OF TEN COMMANDMENTS MONUMENTS.

The Fifth Circuit's decision is consistent with previous decisions by both this Court and the other Circuit Courts of Appeals. In all of these decisions, context is the key. Yet, Petitioner consistently refuses to consider context when discussing how these cases relate to the case at hand.

Petitioner's Brief seeks to compare the Ten Commandments monument at issue here to the crèche display that was held unconstitutional in *Allegheny*, but the two displays have almost nothing in common. The crèche in *Allegheny* "occupied a substantial amount of space on the Grand Staircase," *Allegheny*, 492 U.S. at 580, which was the "'main,' 'most beautiful,' and 'most public' part of the courthouse." *Id.* at 579. In contrast, the Ten Commandments monument is located outside, seventy-five feet *behind* the Capitol Building. *Van Orden*, 351 F.3d at 176. The crèche in *Allegheny* had no historical significance, having been displayed in the courthouse for only five years when it became the subject of litigation. *Allegheny*, 492 U.S. at 579. The Ten Commandments monument, however, has been located in the same position behind the Capitol Building for more than forty-two years. *Van Orden*, 351 F.3d at 175. Finally, the crèche was "distinct and not connected with any exhibit," *Allegheny*, 492 U.S. at 581, whereas the Ten Commandments monument is part of a historical exhibit of seventeen monuments that spans twenty-two acres. *Van Orden*, 351 F.3d at 175. In short, there are almost no correlating facts between *Allegheny* and the instant case;

Petitioner can only draw comparisons between the two cases by ignoring the reasonable observer standard and by refusing to examine the context of the Ten Commandments monument. In actuality, the Ten Commandments monument is much more like the crèche display found constitutional in *Lynch*. "The *Lynch* display composed a series of figures and objects, each group of which had its own focal point" and was "a center of attention separate from the crèche." *Allegheny*, 492 U.S. at 598. As in *Lynch*, the Ten Commandments monument is merely one of seventeen "focal point[s]," a context which negates government endorsement of the monument's religious message.

Petitioner's Brief also places a great deal of emphasis on *Stone v. Graham*, 449 U.S. 39 (1980); *see, e.g.*, Br. of Pet'r at 8, 10-11, 23, 25, 27, 33, 41-42. *Stone*, which struck down a state statute requiring posting of the Ten Commandments in public schools, is easily distinguished. First, the *Stone* Court recognized that the Ten Commandments could be disseminated and discussed in public schools in some contexts: "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function." *Stone*, 449 U.S. at 42 (citation omitted). Maintaining, in a museum-like setting, a monument donated by a private group is a far cry from the mandatory posting of the Ten Commandments in every public school. A state could not mandate that a painting of the Virgin Mary holding baby Jesus be displayed on the wall of every public school, but that does not mean that such a painting is banned from all government property. In fact, many such paintings are hanging in the National Gallery of Art. Second, the Establishment Clause is applied differently in a public school setting than it is in

other contexts. This Court has noted its "particular[] vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools" because of the "great authority and coercive power" that the government exerts due to "mandatory attendance requirements" and to "the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (citations and footnote omitted). The present context presents none of these problems.

Finally, the Fifth Circuit's decision is also consistent with decisions by other Circuit Courts of Appeals concerning Ten Commandments monuments in or near government buildings. Such monuments have been found unconstitutional when they are relatively new, *see Am. Civil Liberties Union v. McCreary County*, 354 F.3d 438, 441 (6th Cir. 2003) (display erected in 1999); *Glassroth v. Moore*, 335 F.3d 1282, 1286 (11th Cir. 2003) (monument installed in 2001), and when they are located in a prominent position and are not part of a larger exhibit. *See McCreary*, 354 F.3d at 441 (framed copy of Ten Commandments was displayed inside the County Courthouse and "was not part of any larger . . . exhibit"); *Glassroth*, 335 F.3d at 1284 (two-and-one-half ton monument of the Ten Commandments was erected "as the centerpiece of the rotunda in the Alabama State Judicial Building" and was purposefully left by itself so as not to "diminish" "the revealed law of God"); *Books v. City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000) (Ten Commandments monument was located on front lawn of City's Municipal Building and could not "be fairly characterized as a component of a comprehensive display of . . . cultural heritage").

However, the Ten Commandments monument at issue here possesses none of these traits: it is forty-two-years old, it is located seventy-five feet *behind* the Capitol

(rather than in the Rotunda or near the main entrance), and it is part of a larger exhibit of seventeen historic monuments that, along with the Capitol grounds, comprise a National Historic Landmark. *Van Orden*, 351 F.3d at 175. It is, therefore, more similar to the displays at issue in *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004) (finding constitutional a Ten Commandments plaque displayed on the side of the Allegheny Courthouse since 1918, that has not been "highlighted or displayed prominently, and is one of several historical relics displayed on the courthouse"), and *Freethought Society v. Chester County*, 334 F.3d 247, 249-50 (3d Cir. 2003) (finding constitutional a Ten Commandments plaque displayed on the side of the Chester County Courthouse since 1920).

When viewed in context, this case resembles cases like *Lynch*: it is a historic display, not located in a position of prominence, that is part of a larger context which negates government endorsement of the display's religious message.

III. Acceptance of Petitioner's Proposed "Field of Vision" Rule Would Result in the Whitewashing of our Nation's Religious History and Fall Far Short of the Neutrality Between Religion and Non-Religion Mandated by the Establishment Clause.

The Fifth Circuit correctly held that the Establishment Clause's "guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another." *Van Orden*, 351 F.3d at 178. This neutrality principle has been set forth by this Court on multiple occasions. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *see also Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (noting that this Court has

"consistently recognized" a requirement that "the government . . . maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("Th[e] [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.").

It is as much a violation of the Establishment Clause for the government to favor non-religion as it is for the government to favor religion. That is why this Court has noted that "'[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch*, 465 U.S. at 672 (citations omitted).

The endorsement test, with its objective "reasonable observer" standard, was created to avoid this "callous indifference" and "hostility toward" religion.[3] As the Fifth

[3] Justice O'Connor made this clear in *Capitol Square*: "[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe. Indeed, to avoid 'entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens,' our Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry. I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof. . . .

It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the

Circuit noted, the "reasonable observer standard attempts to capture the 'concern with the political community writ large'" rather than the concern of "the uninformed, the casual passerby, the heckler, or . . . a single individual." *Van Orden*, 351 F.3d at 178 (quoting *Capitol Square*, 515 U.S. at 779) (O'Connor, J., concurring in part and concurring in judgment). However, Petitioner rejects the entire reasonable observer construct. The new test proposed by Petitioner would require removal from government property of all things religious to which any passerby objects. In other words, Petitioner is seeking to legalize the "heckler's veto of the unreasonable or ill-informed" of which the Fifth Circuit warned. *Van Orden*, 351 F.3d at 182.

Doing away with the reasonable observer standard, as Petitioner requests, would essentially whitewash our nation's religious history by "entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment). As the Third Circuit recently concluded:

> Given our national interest in historical preservation, we believe we would set a dangerous precedent if we were to hold that any relic containing a religious message should be removed merely because "*any* person . . . could find an endorsement of religion" or "*some* people may be offended" by it. Our country's history is steeped in religious traditions. The fact that government buildings continue to preserve

community and forum in which the religious display appears." 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment)) (other citations omitted).

> artifacts of that history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.

Modrovich, 385 F.3d at 410-11 (quoting *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment)).

This Court has long recognized the role that religion has played in our nation's history, *see, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) ("[R]eligion has been closely identified with our history and government . . ."); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."), and has stated that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." *Allegheny*, 492 U.S. at 610. The wiping out of all public references to religion is entirely inconsistent with the Establishment Clause's mandate that government exhibit "neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 103-04. And such whitewashing of our country's religious history will take us dangerously close to an effective endorsement of atheism as our nation's official creed.

CONCLUSION

The historic Ten Commandments monument, which has resided for forty-two years among the other historic monuments on the Capitol grounds, does not constitute a government endorsement of religion. The monument's context establishes that it is merely one of many commemorations of the history and culture of Texas. The Fifth Circuit's opinion makes this point clearly, and *Amicus* respectfully submits that this Court should affirm the Fifth

Circuit's decision and reject Petitioner's proposed "field of vision" test, which would "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens."

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Supreme Court, U.S.
FILED
JAN 26 2005
OFFICE OF THE CLERK

No. 03-1500

In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE, THOMAS MORE LAW CENTER, IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Thomas More Law Center is a national, non-profit, public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the sanctity of human life, time-honored values, and the religious freedom of Christians, including the display of the Ten Commandments on public property. The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities.[1]

As part of its litigation efforts, the Thomas More Law Center has represented government entities in federal court in defense of lawsuits seeking to remove Ten Commandments monuments from public property. The Thomas More Law Center also has submitted amicus curiae briefs in this Court and in the United States Court of Appeals for the Sixth Circuit, Seventh Circuit, and the Eleventh Circuit in support of the public display of Ten Commandments monuments. Accordingly, the Thomas More Law Center has an interest and an expertise in this area of the law, which will be of assistance to this Court in deciding this case.

The Thomas More Law Center appears as amicus curiae in support of respondents and urges this Court to

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[1] This brief is being filed with the consent of all parties. Copies of the consent letters have been submitted to this Court. Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

uphold the ruling of the lower court in favor of respondents.

SUMMARY OF THE ARGUMENT

This case presents this Court with the opportunity to re-evaluate *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), a weak precedent, that involved the display of the Ten Commandments in a public school setting. Although *Stone* is limited to the public school context, lower courts have wrongly considered *Stone* when deciding cases involving the display of the Ten Commandments in non-public school contexts. This Court should clarify the applicability, if any, of *Stone* when it comes to deciding cases involving the Ten Commandments in non-public school contexts.

ARGUMENT

This Court has never decided a case that involves the display of the Ten Commandments, whether alone or in a broader context, as in the instant case, in a non-public school context. In *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), this Court considered a Kentucky statute that required school officials to post a copy of the Ten Commandments *alone* on the wall of *each public school classroom* in Kentucky. *Id.* at 39. This Court summarily struck down the law, holding that it served no secular purpose, even though the Kentucky Legislature had required the following statement of secular purpose to appear at the bottom of each display: "'The secular application of the Ten Commandments is clearly seen in its

adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" *Id.* at 41.

Despite the Kentucky Legislature's clearly stated (and accurate) secular purpose for the display, this Court nevertheless summarily wrote:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.

Id. at 41. This Court, therefore, concluded that the Kentucky statute in question violated the first prong (the purpose prong) of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and consequently violated the Establishment Clause.[2] *Id.* at 42-43.

In reaching its ruling in *Stone*, apart from referencing *Lemon*, this Court relied only on public school prayer cases, *id.* at 40-43 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading and Lord's Prayer), and *Engel v. Vitale*, 370 U.S. 421 (1962) (daily prayer)), thus indicating that this Court viewed *Stone* as a public school

[2] Justices of this Court have criticized *Lemon*, and the time has come for this Court to re-evaluate *Lemon* as a viable precedent. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting) (explaining that "*Lemon* has had a checkered career in the decisional law of this Court" and collecting Supreme Court opinions criticizing *Lemon* and noting further that this Court has stated that *Lemon* is not binding on it).

prayer case in concluding that the Kentucky Legislature's requirement that the Ten Commandments be posted on the classroom walls was purely a religious admonition along the lines of the religious practices prohibited in *Schempp* and *Engel*.

Even though *Stone* is essentially a public school prayer case and is limited to the public school context with regard to the display of the Ten Commandments, *Stone* has become the starting point for Ten Commandment display cases even in non-public school contexts.[3]

This Court could hardly have intended that *Stone* would be applied in a context outside the public school context. This case presents this Court with the opportunity to re-evaluate *Stone*, a weak precedent, and clarify the proper scope and applicability, if any, of *Stone* to cases involving the display of the Ten Commandments in non-public school contexts.[4]

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[3] *E.g.*, *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004); *Adland v. Russ*, 307 F.3d 471, 480-81 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003); *Books v. City of Elkhart*, 235 F.3d 292, 302-04 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); *ACLU v. Hamilton County*, 202 F. Supp. 2d 757, 763 (E.D. Tenn. 2002); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856, 865-66 (S.D. Ind. 2000).

[4] At the time *Stone* was decided, there was little, if any, litigation over the public display of the Ten Commandments in non-public school contexts, and there was only one published federal circuit court decision on the subject, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), which the *Stone* majority did not even reference, further supporting the conclusion that *Stone* is intended to be limited to the public school context. The majority was aware of *Anderson*, which was cited by Justice Rehnquist in his dissenting opinion in *Stone*. *Stone*, 449 U.S. at 45.

1. *Stone v. Graham* Is A Weak Precedent.

Stone is a 5-to-4 per curiam opinion, which sets forth this Court's ruling in summary fashion. As Justices of this Court noted, *Stone* was a "cavalier summary reversal" of the courts of Kentucky that was done without the benefit of oral argument, briefing, or plenary consideration by this Court. *Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting); *see also id.* at 43 (Burger, CJ., joined by Blackmun, J., dissenting); *id.* (Stewart, J., dissenting).

Indeed, this Court should not feel constrained to follow or apply *Stone* in deciding the subject appeal. By its very nature, *Stone* is a weak precedent. As this Court has explained, it is "less constrained to follow precedent where . . . the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998).

Reliance on *Stone* outside the public school context has limited, if any, value since the unique and particular circumstances of the public school context, which led to the holding in *Stone*, do not extend outside that context. This Court should make that clear to the lower courts.

The public school context in which the *Stone* majority considered the display of the Ten Commandments explains the majority's summary conclusions about the Decalogue's religious nature and its summary rejection of the secular purpose advanced by the Kentucky Legislature for displaying the Ten Commandments in those classrooms.

This Court always has been especially concerned about religious activities in public schools, a heightened concern that it does not extend beyond the public school context. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592 (1992)

("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 620 n.69 (1989) (explaining that although a public display of a Christmas tree and a menorah in a non-public school context was found to be constitutional, such a display located in a public school context would raise additional constitutional considerations since the Establishment Clause must be applied with a special sensitivity in that context).

The heightened concerns this Court has about anything religious in the public school setting, however, should not be applied to displays of the Ten Commandments in non-public school settings, where children are not compelled to be present as they are in a public school classroom where the Ten Commandments are posted alone as in *Stone*. *See Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1023 (Col. 1995) (en banc) (explaining that reliance on *Stone* is misplaced in analyzing the display of the Ten Commandments except when the Decalogue is displayed in a public school classroom, where students are compelled to attend and are easily influenced), *cert. denied,* 516 U.S. 1111 (1996); *see also City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) (noting that the concerns in *Stone* regarding the public school context do not apply outside that context).

2. The Ten Commandments Should Be Acknowledged In Public Whether Alone Or As Part Of A Broader Display.

Although originating from a religious text, the Ten Commandments are not as limited in scope as a reading of the *Stone's* majority opinion may suggest. This Court should make it clear to the lower courts that it did not intend in *Stone* to limit the importance of the Ten Commandments to being just a "sacred text" that lack secular applications. This Court should also make it clear that it did not intend to raise the presumption that the public display of the Ten Commandments violates the Establishment Clause even in a non-public school context.[5]

As has been repeatedly acknowledged, especially after the issuance of *Stone*, except by a majority of this Court (which should clearly make the acknowledgement) the Ten Commandments undeniably form the basis of the judicial code of Western Civilization, which is something that should be acknowledged in public. *See, e.g., City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari) ("Undeniably ... the [Ten] Commandments have secular significance [besides being a sacred text] because they have made a substantial contribution to our secular legal codes."); *Books v. City of Elkhart,* 235 F.3d 292, 302

[5] Although in *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), a public school case, this Court explained that it did not mean in *Stone* that "no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization," this limitation of *Stone* needs to be reiterated by this Court in the context of the display of the Ten Commandments in a non-public school setting.

(7th Cir. 2000) ("The text of the Ten Commandments no doubt has played a role in the secular development of our society. . . ."), *cert. denied,* 532 U.S. 1058 (2001); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir. 1973) (noting that the Ten Commandments have religious and secular attributes), *cert. denied*, 414 U.S. 879 (1973); *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 784 (E.D. Ky. 2002) ("[F]or good or bad, right or wrong, the Ten Commandments *did* have an influence upon the development of United States law. . . ."); *Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) ("The 'Ten Commandments,' while a sacred text to some and an ethical code of conduct to others, is also a landmark in the history of the development of Western law."), *aff'd in part, rev'd in part*, 297 F.3d 995 (10th Cir. 2002); *Crockett v. Sorenson,* 568 F. Supp. 1422, 1428 (W.D. Va. 1983) ("[T]he Ten Commandments have had immeasurable effect on Anglo-American legal development."); *Colorado v. Freedom from Religion Found.,* 898 P.2d 1013, 1024 (Colo. 1995) (en banc) (noting "the historical fact that the Ten Commandments has served over time as a basis for our national law"), *cert. denied*, 516 U.S. 1111 (1996).

This Court should clearly acknowledge the contributions the Ten Commandments have made to the development of our law to ensure that there is no presumption, as *Stone* tends to engender, that there can be no secular purpose for the display of the Ten Commandments in public, even in a non-public school context.

Along those lines, because *Stone* pre-dates *Lynch v. Donnelly,* 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which are this Court's two

leading cases that provide the analytical framework for determining the constitutionality of government displays of items with religious connotations, this Court should clarify for the lower courts how *Stone* should be weighed, if at all, when analyzing the display of the Ten Commandments in non-public school contexts in light of *Lynch* and *Allegheny*.

In *Lynch* and *Allegheny*, this Court upheld the government display of religious symbols (the crèche and the menorah) as part of a broader display in a non-public school context. *Lynch,* 465 U.S. at 671-72, 687; *Allegheny,* 492 U.S. at 581-82, 621. Although in *Lynch* and *Allegheny*, religious objects (the crèche and the menorah) were permitted to be included in public displays, the same result does not generally occur when the Ten Commandments are involved, even though the Commandments have both sacred and secular attributes. This result can reasonably be attributed to the presumption in *Stone* against the public display of the Ten Commandments, no matter the secular purpose for the display. If a crèche and a menorah, both religious symbols, may be included in public displays, then the Ten Commandments, which have both sacred and secular attributes, should be permitted, whether displayed alone or as part of a broader display.

CONCLUSION

This Court should uphold the judgment of the lower court and rule in favor of respondents.

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January 26, 2005

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Supreme Court, U.S.
FILED
JAN 31 2005
OFFICE OF THE CLERK

No. 03-1500

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

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INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

SUMMARY OF THE ARGUMENT

This brief will explain why this case should be remanded with instructions to dismiss the appeal for want of jurisdiction. Although Establishment Clause claims are now regularly brought under 42 U.S.C. § 1983, Congress never intended this to be the case. An examination of the legislative history of § 1983, 42 U.S.C. § 1988, and of the Fourteenth Amendment will demonstrate this fact.

However, should this Court disagree, the brief will also argue that this case should be decided under *Marsh v. Chambers*, 463 U.S. 783 (1983). The instant monument

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[1] The parties have consented to the filing of this brief. A copy of the letter of consent from Petitioner has been lodged with the Clerk of the Court. A copy of the letter of consent from Respondent accompanies this brief. No counsel for any party has authored this brief in whole or in part. To date, no person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel. A grant application is pending with the Alliance Defense Fund for work done on this brief. The Alliance Defense Fund is a 501 c 3 organization that helps public interest law firms and private attorneys fund their work in the public interest. The Alliance Defense Fund did not control the content of this brief, did not help author it, and did not even see it prior to completion.

passes muster under *Marsh*, because it is within two long-standing traditions which are validated by *Marsh*.

ARGUMENT

I. THIS CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO DISMISS THE APPEAL FOR WANT OF JURISDICTION BECAUSE ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. § 1983.

This lawsuit was brought pursuant to 42 U.S.C. § 1983. Because § 1983 (and its jurisdictional counter part 28 U.S.C. §1434(3))[2] does not give the federal courts jurisdiction in Establishment Clause cases, this case should be remanded with instruction to dismiss the appeal for lack of subject matter jurisdiction.

At first blush, this assertion may seem counterintuitive since plaintiffs have developed the habit of routinely using § 1983 as a vehicle for Establishment Clause claims. However, as this Brief will demonstrate, Congress never intended this to occur.

At least one federal court has directly raised—but not answered—the question of the appropriateness of bringing Establishment Clause claims under § 1983. In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution

[2] This Court explained the relationship between § 1983 and §1434 (3) in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972). However, because some of the opinions of this Court with which this brief will interact speak of jurisdiction under § 1983, this brief will follow suit and use this shorthand.

and the co-extensive Establishment Clause of the Hawaii Constitution. The Ninth Circuit upheld the district court's granting of summary judgment in favor of the government defendants. However, along the way, the Ninth Circuit questioned, without further addressing, the "efficacy" of bringing the Establishment Clause claim under § 1983:

> Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (simply noting that establishment clause challenge was brought under § 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

Cammack, 932 F.2d at 768 n.3

Since *Cammack*, additional cases, such as *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), have reached this Court in a similar posture to *Allegheny*, that is, the Establishment Clause claim has been brought under § 1983 without the Court acknowledging that fact. However, to date, *Marsh* remains the only case brought under § 1983 in which the Court has both acknowledged that fact and decided the claim on the merits. Thus, no great body of case law from this Court stands for the proposition that Establishment Clause cases *should* or *can* be brought under § 1983.

Furthermore, this Court has often allowed certain

types of claims to come before it on multiple occasions without comment and then, when a subsequent party squarely raised the jurisdictional issue, this Court has decided that such claims were not properly brought. In fact, this Court has done this on several occasions in the § 1983 context. For example, this Court had often accepted cases in which a state had been sued under § 1983 before deciding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) that a state is not a person for purposes of § 1983. *See, e.g.*, cases collected in *id.* n.4. Significantly, the *Will* Court specifically noted that "'this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 535, n. 5 (1974)." *Id.* (brackets original).

Therefore, this Court should follow the lead of the *Cammack* court and question whether § 1983 is a proper vehicle for bringing an Establishment Clause claim. The only reason that the *Cammack* court did not answer the question was because the parties did not raise the question. However, *Amicus* is hereby squarely raising the question,[3] and, for the reasons stated below, this Court should conclude that § 1983 does not cover Establishment Clause claims and that, therefore, the appeal should be dismissed.

Until the passage of 42 U.S.C. § 1988, The Civil Rights Attorney's Fee Awards Act of 1976, virtually no Establishment Clause cases were brought under § 1983. Since the passage of that act, the number of cases has exploded. While the date of enactment is not a perfect dividing line because of cases that were already "in the pipeline," it is a close proxy. For ease of demonstration, the number of opinions available on Lexis serves as an

[3] This Court has previously stated that it will consider arguments raised only by an amicus curiae. *Davis v. Unites States*, 512 U.S. 452, 457 (1994).

adequate indicator. To the best of *Amicus'* ability to ascertain, prior to the enactment of § 1988 (*i.e.*, in the entire period from § 1983's enactment in 1871 until § 1988's enactment in late 1976), only 34 opinions are available in which both § 1983 is cited and the term "Establishment Clause" is used. In contrast, in the less than thirty years subsequent to § 1988's enactment 640 such cases can be found.[4]

The reason for this dramatic increase seems obvious. Justice Powell suggested the reason in his dissent in *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980)[5]: "There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought. . . . [I]ngenous pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."

Today this phenomenon has turned into a virtual "blackmail scheme" by strict separationists. In other words, the statistics noted above do not begin to tell the whole story. Many lawsuits are not filed or are quickly settled because public interest law firms and others threaten localities and state defendants with the prospect of paying enormous attorney fee awards. *See generally*, Steven W. Fitschen, *From Black Males to Blackmail: How the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's Most*

[4] Admittedly, not every opinion found with this technique will actually deal with an Establishment Clause claim brought under §1983. However, the statistical point is still valid.

[5] The context of his remarks was different than that being addressed (*i.e.*, possible abuse of pendant jurisdiction), however, the concern is transferable.

Historic Civil Rights Statutes (forthcoming).[6] As just one example, Indiana Civil Liberties Union attorney Kenneth Falk was interviewed for an article in the *Indiana Lawyer* about Ten Commandments monuments. Discussing the possibility of lawsuits, Falk stated, "If we prevail, we get fees, and they're going to pay the ICLU an enormous amount of fees." Cited in *id.*

Were it not for one thing, all of this might be chalked up as the price of "doing business," *i.e.*, of erecting monuments that one knows strict separationists object to. That one thing is congressional intent. Ironically (given the uses to which § 1988 has been put), the legislative history of § 1988 gives us some insight into the legislative history of § 1983, and these two histories show clearly that Congress never intended § 1983 to cover Establishment Clause claims.

Looking first at the legislative history of § 1988, it is plain that the purpose of the Act was to restore the ability of plaintiffs to get attorneys' fees *in civil rights lawsuits only*. The Act was a response to this Court's decision in *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975). In *Alyeska*, this Court had declared that attorneys' fees would no longer be available to plaintiffs in federal lawsuits unless Congress expressly authorized such fees by statute. *Id.* at 269-71. *Alyeska* itself was an environmental case, not a civil rights case. Yet Congress' great concern was with restoring attorneys' fees in traditional *civil rights* cases.

As Senator John V. Tunney, Chairman of the Senate Judiciary Subcommittee on Constitutional Rights noted when he introduced the original version of the bill that became the Act:

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[6] A working draft of this article is available at http://www.nlf.net/articles/blackmail.pdf.

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary, 94th Cong. 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 1988, S. 2278, Source Book: Legislative History, Texts, and Other Documents* (1976) at 3. [Hereinafter, *Source Book*.]

The emphasis throughout the debates on the Act remained single-minded: Americans who were the victims of racial discrimination needed to be able to attract attorneys through a fee-shifting provision. There was simply no thought that Establishment Clause claims would fall under § 1988 provisions. *See generally*, *Sourcebook* throughout; Fitschen, *supra*, throughout. One of the main proponents of the Act was Senator Edward Kennedy (D-Mass). Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination" in areas such as "jobs, housing, credit, or education" using the "civil rights laws." *Sourcebook* at 23.

Furthermore, the legislative history is also abundantly clear that only two additional provisions were added as part of the political give and take needed to ensure passage of the Act: The Title IX provision protecting against sex discrimination in education, and the provision for the protection of taxpayers defending themselves against suits or proceedings by the Internal Revenue Service. *Source Book* at 21-22, 197-98. Congress simply did not intend to provide for fee-shifting in Establishment Clause cases.[7]

Secondly, the legislative history of § 1983 itself confirms that the drafters of § 1988 correctly understood the intended coverage of § 1983. Section 1983 is one of the surviving provisions of the Ku Klux Act of 1871. Section 1983 started out as § 1 of that Act. As numerous courts and commentators, including this Court, have documented, § 1 was one of the provisions that Congress debated least. *See, e.g. Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 665 (1978). However, the meaning of "rights, privileges and immunities" can be determined by examining the debate over the entire act.

The starting point for this process is to note that, as a bill, the Act was entitled "A Bill to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." *Cong. Globe*, 42 Cong., 1st Sess. 597 (1871). In that context, it is significant that after Representative Shellabarger (R., Ohio) reported the bill on behalf of the Select Committee, Representative Stoughton (R., Michigan) spoke to set the stage. *Id.* at 599. He started with the activity of the Ku Klux Klan in North Carolina. *Id.* at 599 ff. He noted "murders, whippings, intimidation,

[7] Similarly, none of the subsequent additions and deletions is in any way relevant to Establishment Clause claims. *See* 42 U.S.C. 1988(b).

and violence." *Id.* He also discussed the Klan's ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries. *Id.* at 600. Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee. *See generally, id.* at 600 ff. He read testimony of Blacks who had been victims of violence and he read testimony of Whites who knew the inner workings of the Klan, as well as of judges who knew of incidents of perjury. *Id.* Near the end of his remarks, he summarized the need for the act:

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."

Id. at 606.

With all of the preceding as background, it is readily understandable that the most common view of "rights, privileges, and immunities" was one that equated it with life, liberty, and property. *See, e.g., Cong. Globe*, 42 Cong., 1st Sess. 615 (1871). However, some

Congressmen gave extended comments with illustrative examples of the concerns that animated the passage of the Act. None raised any Establishment Clause concerns. The following example by Representative John Coburn is typical of the more extended remarks:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A

> systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it.

Id. at 619-20.

This quotation, typical of many others, reminds the modern student of the Act that one must never stray far from the historical context of Klan abuses if one wants to understand what § 1983 was intended to do. Here again, one sees a close connection between the concepts of equal protection and of rights, privileges, and immunities. Moreover, one also finds some specific rights mentioned, *i.e.*, "the right[s] to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms." *Id.*

Furthermore, during the debates over the meaning of "rights, privileges, and immunities" a distinction was made between civil rights and political rights. *See, e.g.*, *Cong. Globe*, 42 Cong., 1st Sess. 635-36 (1871). While the meaning of those terms was not fixed even then, *see id.*, and while the use of these terms has changed to some extent today, civil rights were generally seen as those fundamental rights spelled out in the nation's charter, the Declaration of Independence, and to which all persons were entitled by the law of nature. At a minimum, the debates indicate, *see id.*, that Congress understood, and if anything, more sharply drew, the modern black letter law distinction:

> It has been said that political rights are

> included within the more comprehensive term "civil rights," but that they are differentiated in that a political right is a right exercisable in the administration of government, or a right to participate, directly or indirectly, in the establishment or management of government, while civil rights have no relation to the establishment or management of government. Political rights have also been distinguished on the ground that a civil right is a right accorded to every member of a distinct community or nation, which is not necessarily true with regard to political rights.

15 Am. Jur. 2d Civil Rights § 2 (citations omitted).

With this distinction very much in the forefront of debate, Congress intended § 1983 to cover only civil rights. The Establishment Clause is relevant to the "establishment or management of government." Does that mean that governments can therefore willfully violate the Establishment Clause with impunity? Certainly not. Assuming *arguendo* that this Court should conclude that the instant monument violates the Establishment Clause (a position with which *Amicus* would disagree), Mr. Van Orden (as any aggrieved citizen of any locality or state) could sue directly under the Establishment Clause instead of under § 1983—as was routinely done prior to 1976. All that would be lost would be the "blackmailing" effect of the § 1988 fees anticipated by Justice Powell and never intended by Congress.

Despite the force of the historical argument, the position advocated here faces the problem of

overcoming *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980). In that case, this Court held that statutory § 1983 claims should not be limited to civil rights statutes only.

However, that problem is not insurmountable. This Court could simply decide that the *Thiboutot* minority had the better of the argument over the legislative history of § 1983 and overturn *Thiboutot* to the extent necessary. However, this Court *need not* do so to decide that Establishment Clause claims are not properly brought under § 1983. After all, the Ninth Circuit was well aware of *Thiboutot* when it questioned whether § 1983 was a legitimate vehicle for bringing Establishment Clause claims (having, according to a Lexis search, cited or quoted it 28 times prior to issuing its *Cammack* opinion) and it did not think that *Thiboutot* foreclosed the question.

This Court can simply acknowledge that deciding that § 1983 covers all laws (which after all by definition implicate "rights, privileges and immunities") is analytically distinct from deciding that the Establishment Clause encompasses any "rights, privileges [or] immunities at all. While the validity of this distinction is arguably demonstrable from the legislative history of the Ku Klux Act, *see* Fitschen, *supra*, it is even clearer when one looks at the legislative history of and scholarship about the Fourteenth Amendment itself.

Various views existed as to what the Privileges and Immunities Clause of the Fourteenth Amendment was meant to include and, indeed, each of the opinions written in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) could find support in the legislative history of that

Amendment. *See*, Fitschen, *supra*, Section IV. However, all of those views have one thing in common: none sees the term "privileges and immunities" as implicating the Establishment Clause—even were it to be restated in terms of "a right to be free from establishment of religion."

Chester Antieau, a leading § 1983 expert, collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment and which the Fourteenth Amendment was designed to "constitutionalize") and from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth Amendment*. These statements clearly demonstrate that the free exercise of religion was intended to be covered by the term "privileges and immunities" but that "freedom from establishment" was not.

Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect it. *Id.* at 91. By contrast, Antieau could find no evidence of any Senator or Representative mentioning "freedom from establishment." *Id.* at 108 ff. There is more than mere silence to the argument however. At least three important commentators, Senator Howard, Representative H. L. Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause. *Id.*

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity. *Id.* at 108 ff, 282-285. This evidence includes state statutes, constitutions, and court decisions. Some states still had vestiges of true establishment. For example, both New Hampshire and Massachusetts still provided constitutional preferences for Protestant Christianity. *Id.* at 110. These states, as Antieau points out, would not have ratified the Fourteenth Amendment if they thought it would endanger their establishments.

Therefore, there is no right, privilege or immunity implicated by the Establishment Clause. Thus, *Thiboutot* is no obstacle to the argument advanced here.

Thus, for the various reasons just described, this Court should recognize that § 1983 does not give the federal courts jurisdiction over Establishment Clause claims and it should vacate the opinion of the Court of Appeals and remand the case with instructions to dismiss the appeal for want of jurisdiction.

II. THE MONUMENT SHOULD BE EVALUATED AND UPHELD UNDER *MARSH V. CHAMBERS* BECAUSE IT FALLS WITHIN TWO PRACTICES THAT ARE "DEEPLY-ROOTED IN OUR HISTORY AND TRADITION."

However, should this Court disagree, *Amicus* urges

this Court to affirm the decision of the Fifth Circuit. The court below correctly concluded that Ten Commandments display passes each prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and does not represent an establishment of religion. *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003). However, this Court, in granting *certiorari* in *McCreary County, Kentucky v. ACLU of Kentucky*, No. 03-1693, certified two questions of import to this case, namely whether *Lemon* and its test should be overruled and, if so, what test should take its place. *Amicus* believes that *Lemon* should be overruled and that a test which correctly articulates the concerns of the Framers should replace it. However, in certain situations, including this one, the test articulated in *Marsh v. Chambers*, 463 U.S. 783 (1983), stands as a proxy for those concerns. The *Marsh* test asks whether the long-standing practice at issue, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n. 4 (1985) (Powell, J., concurring) (citation omitted). This approach is the valid one for the case at hand.

As Chief Justice Rehnquist has noted, "[a]ny deviation from [the Framers'] intentions frustrates the permanence of that Charter and will only lead to . . . unprincipled decisionmaking . . . ." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).[8] Therefore, the importance of deciding this case in light of history cannot be overstated. In making its decision, this Court should focus on the historical context, which gave

[8] Similarly, James Madison, the chief architect of the First Amendment, stated that the proper approach to the Constitution was to "resort[ ] to the sense in which the Constitution was accepted and ratified by the nation." Letter from James Madison to Henry Lee (June 25, 1824), *in* IX The Writings of James Madison, at 191(Gaillard Hunt, ed. 1910).

rise to our long tradition of publicly expressing religious sentiments, and not on the religious content of the monument or even its secular aspects. An inquiry conducted in the light of history will lead inevitably to the conclusion that the display of the city's monument is consistent with the Framers' understanding of the First Amendment.

We first note that some courts have tried to limit *Marsh* to chaplaincy cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist.* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, such an approach is clearly not that of this Court. Indeed, this Court has not even limited *Marsh* to Establishment Clause cases. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997); *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991). In *Printz*, this Court considered whether federal use of state executives in law enforcement was a power exercised by the first Congress. *Printz*, 521 U.S. at 905. There, it "rest[ed] its conclusion" on its examination of evidence found "in the early years of the Republic." *Printz*, 521 U.S. at 948-49 (Stevens, J., dissenting). This Court in *Harmelin* cited *Marsh* in its historical examination of whether the Eighth Amendment provided a proportionality guarantee against cruel and unusual punishment. *Harmelin*, 501 U.S. at 980. It is clear that courts that have constrained *Marsh* to chaplaincy cases are wrongly decided, in light of this Court's precedent.

Lower courts have also engaged in *Marsh's* historical analysis in a variety of case settings. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote in House of Representatives Committee of the Whole); *Dornan v. Sanchez*, 978 F. Supp. 1315, 1319 (C.D. Cal. 1997) (upholding discovery subpoena rule under Federal Contested Elections Act); *Nat'l Wildlife Fed'n v. Watt*,

571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining leasing federal lands for coal mining); *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983) (evaluating Indian Commerce Clause).

Further, where *Marsh* has been applied in the Establishment Clause context, it has not been limited to legislative prayer cases. Of chief importance, courts have applied *Marsh* in religious display cases. *See e.g., ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986). Courts have also used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); the prayer room at the Illinois statehouse, *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir.1988); public proclamations with "religious" content, *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla.1989); the dating of government documents with "A.D.", *benMiriam v. Office of Pers. Mgmt.*, 647 F. Supp. 84, 86 (M.D.N.C. 1986); religious expression in the form of an invocation and benediction at a public university annual graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); and the Pledge of Allegiance recited in a public school, *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

Of course, the most significant consideration here is that this Court has never overturned *Marsh*, either explicitly or *sub silentio*. This Court had every opportunity to do so in *Lee v. Weisman*, 505 U.S. 577 (1992), and instead chose merely to distinguish the case.

In *Weisman*, this Court noted *Marsh's* on-going viability and explained why it would not apply *Marsh*. *Weisman*, 505 U.S. at 596. This Court did not overturn, criticize, or even question *Marsh*; nor did it characterize *Marsh* as anomalous. The Court merely stated that

"[i]nherent differences between the public school system and a session of a state legislature distinguish[ed] [*Weisman*] from *Marsh v. Chambers*." *Id.* (citation omitted). This Court went on to note that, while the invocation and benediction at issue in *Lee* were in many regards similar to the issues considered in *Marsh*, there were obvious differences. *Id.* at 597. Those differences were the age of the people hearing the prayers, the ability to leave if desired, and the context in which they heard the prayers. *Id.* This Court stated that the "decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to distinguish the *public school context*." *Id.* (citations omitted) (emphasis added). Relying primarily on the young age of the school children, this Court found that the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* This Court also noted that the "*Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there." *Id.*

In the instant case, all of the differences noted in *Lee* are absent. At the most basic level, this is a *display* case, not a school prayer case. Yet, significant differences as to context, setting, and audience exist in this case. Here, the monument stands on the Texas state capitol grounds, outdoors, in the company of seventeen other monuments and memorials. *Van Orden*, 2002 U.S. Dist. LEXIS 26709 at 4-5. The experience of Mr. Van Orden aptly describes the typical audience; he has been exposed to its presence on the capitol grounds on his way to and from the Texas State Law Library. *Id.* at 7. The monument cannot capture an unwilling audience, and Mr. Van Orden can, of course, leave its premises at will or avoid it altogether. The delivery of the religious message is also inherently subject to the viewer's free will. The

viewer must, by deliberate affirmative act, choose to read the inscribed message in order to ascertain its content. Finally, the age of the viewer is not an issue here since, even if a significant number of children are on state grounds, they are no more captive to the monument's inscription than another passerby and, in fact, would likely be less attentive to the contents of the monument than would an adult. As such, it is hard to imagine an Establishment Clause scenario further removed from the distinguishing elements in *Weisman*.[9] Simply put, *Marsh* controls this case.

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id.* and that it had "become part of the fabric of our society." *Id.* at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court stated that the *actions* of the First Congressmen corroborated their intent that prayers before legislatures not contravene the Establishment Clause. *Id.* at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id.* at 788.

Some courts have been willing to consider a challenged practice under *Marsh*, but have applied it at an improper level of abstraction. One of the most egregious examples is provided by the district court in *Glassroth v. Moore*, 299 F. Supp. 2d 1290, (M.D. Ala. 2003), the case

[9] Furthermore, children would be just as much or as little influenced by the practices described below as by the monument. Therefore, the analysis that follows is yet another reason why the presence of children on the capitol grounds is not a dispositive concern.

in which the Ten Commandments monument in the Alabama Judicial Building was challenged. This is best understood by comparing that court's opinion with the opinion of the Sixth Circuit sitting *en banc* in *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001), which approved the display of the state motto containing a religious inscription.

In that case, the ACLU sued to enjoin the placement of the State motto of Ohio, "With God, All Things Are Possible," and the state seal in a large display in the plaza in front of the state Capitol. *Id.* at. 292. In rejecting the Establishment Clause claim, the Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The Sixth Circuit specifically noted the following: President Washington's congressionally-solicited Thanksgiving Proclamation, Congressional chaplains, the reenactment of the Northwest Ordinance, the references in forty-nine state constitutions to God or religion, court decisions calling for the veneration of religion, the upholding of blue laws, Thanksgiving Proclamations by presidents other than Washington, President Lincoln's Gettysburg Address, and the repeated upholding of "In God We Trust" on our currency. *Id.* at 296-301.

Two points stand out about the Sixth Circuit's analysis. The first point is that the *Capitol Square* court took one of *Marsh's* most cited principles and applied it directly to a display case. Having traced acknowledgements of God back to the First Congress, the Sixth Circuit concluded that the Ohio motto display which also acknowledges God was constitutional under *Marsh*:

> The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government

> from acknowledging the existence of Him whom they were pleased to call "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the monument in question clearly passes constitutional muster.

Capitol Square, 243 F.3d at 300.

The second point is that the Sixth Circuit did not consider historical evidence involving only religious displays. In fact, *none* of its examples dealt with religious displays. Thus, the Sixth Circuit understood that the *Marsh* analysis must be done at the proper level of abstraction.

In comparison, the *Glassroth* court's analysis was conducted at the wrong level of abstraction. It asked whether "members of the Continental Congress displayed the Ten Commandments in their chambers." *Glassroth*, 229 F. Supp. 2d at 1308.[10] Under this test, the Sixth Circuit should have held the display of the Ohio motto unconstitutional absent evidence that the Continental Congress had displayed it in its chambers. Merely stating this approach highlights its failings.

[10] Admittedly, *Glassroth* involved other factually unique aspects. Nonetheless, the statement quoted above was given as another reason why the monument violated the Establishment Clause.

Similarly, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order (N.D. Ind. Mar. 19, 2004), the district court held that the tradition of erecting Ten Commandments displays only began in the 1940s; thus, it could not meet the *Marsh* standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition." Here again, the Capitol Square court's approach is the better one—Ten Commandments displays are part of a larger tradition that does have an adequate historical pedigree. Indeed as will be demonstrated below, these monuments are actually part of two important traditions.

A. The Monument Should be Upheld Because it is Part of a Long-standing Tradition of Inscribing Religious References on Public Property.

This nation has a long-standing tradition of inscribing religious sentiments and scriptural references on government property. Examples abound, but the following list illustrates the point:[11]

- In the House of Representatives Chamber, in our nation's Capitol, directly above and behind the Speaker's Chair is the inscription, "In God We Trust."
- Directly opposite the Speaker's Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear, this one has the most prominent position.
- In the Capitol is a private room dedicated for use by members for prayer and

[11] The examples are drawn from Catherine Millard, *God's Signature Over the Nation's Capital* (1988).

meditation. This room contains a stained glass window, depicting George Washington with his hands clasped together in prayer.

- In the main reading room of the Library of Congress are two statues, one of Moses, and one of "Paul, Apostle to the Gentiles."
- The Lincoln Memorial, on its north wall, bears the words of Lincoln's Second Inaugural Address, in which he uttered a number of religious sentiments and quoted directly from scripture, including the verse from the Old Testament: "The Judgments of the Lord are righteous and true, altogether."
- In Arlington National Cemetery, at the Tomb of the Unknown Soldier, these words appear: "Here lies in Honoured glory, An American soldier known but to God."

Displaying the Ten Commandments on a monument on state capitol grounds is in no way different from these practices.

Though some would expunge our history of all things religious, they cannot escape the fact that our nation's past is replete with public proclamations of our belief in God and His sovereignty. This type of public expression is a longstanding, uninterrupted tradition that has enriched our nation, and one which should not fall under Mr. Van Orden's unforgiving view of the Establishment clause. The display is simply "a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

B. <u>The Monument Should be Upheld Because it is Part of a Long-standing Tradition of Governmental Acknowledgement of the Role of Religion in Society and of God.</u>

The monument is also part of a long-standing tradition of governmental acknowledgement of the role of religion in American life. At the time the First Amendment was drafted, officials of our new government took part in, or were witness to, numerous instances of such acknowledgements. These acknowledgements were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

In *Marsh*, the Supreme Court cited much of this history in support of its finding that legislative prayer was a constitutional practice, and found this history relevant to its analysis. That Court noted, for instance, that just three days after the First Congress authorized appointment of paid chaplains to open sessions of Congress with prayer, the same Congress reached final agreement on the language of the First Amendment. *Id.* at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true, moreover, for the executive as well as the legislative branch. George Washington, in his first inaugural address, also acknowledged America's religious heritage:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential

> aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government. . . .

George Washington, First Inaugural Address, *in* I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897).

In fact, it was the first Congress that urged President Washington

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging . . . the many . . . favors of Almighty God. . .

Id. at 56.

As this Court has noted, this Thanksgiving resolution was passed by the Congress on the *same day* that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788, n. 9; *Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). President Washington did, in fact, set aside November 26, 1789 as a day on which the people could "unite in most humbly offering [their] prayers and supplications to the great Lord and Ruler of Nations . . . and [to] beseech Him to pardon [their] national and other transgressions. . . ." I *Messages and Papers* at 56.

Furthermore, many of these acknowledgements go beyond acknowledging the role of religion in American life. They directly acknowledge God Himself. The display of the Ten Commandments is perfectly consistent with our centuries-old tradition of government publicly acknowledging God's sovereignty in our nation's affairs. For reasons noted above, consistency with historic practice

is highly relevant to this case, and a factor to which the Court should give considerable weight. Examples too numerous to mention could be cited, but the following brief list illustrates the wealth of this tradition:

- *Thomas Jefferson's Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins: "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author of our religion," who is described as "Lord both of body and mind."[12]
- *The Declaration of Independence* acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."
- *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[13]
- *George Washington* frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion that it was "the *duty* of all nations to acknowledge the providence of Almighty God. . . ."[14]

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[12] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).

[13] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).

[14] *See Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897)

- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[15]
- *Abraham Lincoln* frequently made public expressions of religious belief. One of many examples is found in a Proclamation he issued August 12, 1861, in which he called for a national day of "humiliation, prayer, and fasting for all the people of the nation . . . to the end that the united prayer of the nation may ascend to the Throne of Grace and bring down plentiful blessings upon our country."[16]

Lincoln apparently saw no conflict between the First Amendment and his very public exhortations to the citizens that they should "humble [themselves] before [God] and . . . pray for His mercy" and that they should "bow in humble submission to His chastisements."[17]

(emphasis added). Other examples, include: (1) First Inaugural Address, April 30, 1789 (acknowledging "the Almighty Being who rules over the Universe"), *Id.* at 43; (2) Message to the Senate, May 18, 1789 (seeking a "divine benediction . . . ."), *Id.* at 47; (3) Fifth Annual Address to Congress, December 3, 1793 ("humbly implor[ing] that Being on whose will the fate of nations depends . . . ."), *Id.* at 131; (4) Sixth Annual Address to Congress, November 19, 1794, *Id.* at 160 ("imploring the Supreme Ruler of Nations to spread his holy protection over these United States . . . ."); (5) Eighth Annual Address to Congress, December 7, 1796, *Id.* at 191 (expressing "gratitude to the Ruler of the Universe . . . ."); and (6) Farewell Address, September 17, 1796, *Id.* at 213 (invoking "Providence . . . .").

[15] Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

[16] Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).

[17] VII *Messages and Papers of the Presidents* 3237.

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs, and the tradition continues to this day.[18]

Thus, whether the instant monument be characterized as acknowledging the role of religion in American life or as acknowledging God, it is well within a long-standing tradition validated by *Marsh*. As noted above, the historical acceptability and longevity of a practice should mean that we, today, begin our analysis with the presumption that these practices, or those sufficiently similar, are indeed constitutional. *County of Allegheny*, 492 U.S. at 670. (Kennedy, J., concurring in part and dissenting in part).

A decision in favor of Mr. Van Orden's view would be in direct conflict with the intentions of the Framers of the First Amendment, and with practices and traditions of this nation which have endured for generations, and which continue to this present day. Throughout our nation's history our government has openly declared its faith in, and reliance upon, God and His favor.

This history is a source of pride to some, and of embarrassment to others, but it is our history, nonetheless. This Court must therefore decide this case in the light of that history. The display of the Ten Commandments monument will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell, or the national motto on our coins.

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of

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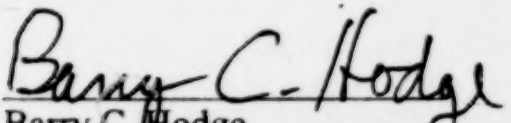
[18] Furthermore, the above examples serve to show that when the Capitol Square ordered that the New Testament attribution be removed from the Ohio motto display, *Capitol Square*, 243 F.3d at 310 it need not have done so.

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim should be placed firmly and irrevocably upon those who, by their "untutored devotion to the concept of neutrality," *Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would make it their business to deny the citizens of Texas this simple acknowledgement of their history and tradition.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the Court of Appeals and remand the case with instructions to dismiss the appeal for want of jurisdiction. In the alternative, this Court should analyze the monument under *Marsh* and affirm the decision of the Court of Appeals.

Respectfully Submitted,
this 31st day of January, 2005



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